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State and Local Taxation

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STATE AND LOCAL TAXATION*

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This article surveys recent statutory and case developments in the field of state and local taxation. Particular emphasis is placed on real property taxes and the impact of recent decisions by the Supreme Court of Florida on the public purpose exemption of the leasehold taxation statute. The authors also report and analyze developments in corporate income taxes, estate taxes, sales and use taxes, and documentary stamp taxes.

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* This article covers significant developments in legislation and in case law for 1975 and 1976.

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I. REAL PROPERTY TAXES

A. *Valuation*

1. JUST VALUATION

The Florida Constitution[1] requires that property appraisers assess property within their jurisdictions at "just valuation."[2] This constitutional provision has been implemented by the legislature through a statute prescribing eight factors to be taken into consideration in computing just valuation.[3] These factors are: (1) the present cash value of the property; (2) the present use of the property, and the highest and best use to which the property can be expected to be put in the immediate future;[4] (3) the location of the property; (4) the quantity or size of the property; (5) the cost of the property and the present replacement value of any improvements thereon; (6) the condition of the property; (7) the income from the property; and (8) the net proceeds from the sale of the property.[5]

Litigation is common in the area of valuation. This prevalence of litigation arises partially because the legislature has never stated definitively whether the eight factors in the statute should be considered equally or weighted in some particular order. A recent illustration of the importance of interpretations of the just valuation statute[6] was evidenced in *Lanier v. Walt Disney World Co.*[7]

The suit involved the Walt Disney World amusement complex in Orange County, Florida. Besides owning the vast acreage which the complex occupied in Orange County, the taxpayer, Disney, owned a great expanse of contiguous undeveloped land in Osceola and Orange Counties. Out of the total of approximately 27,300 acres Disney owned at this site, 10,300 acres were in Osceola County. The litigation involved the valuation only of the property in Osceola

1. FLA. CONST. art. VII, § 4.

2. The term "just valuation" is synonymous for tax purposes with "full cash value." McNayr v. Claughton, 198 So. 2d 366, 368 (Fla. 3d Dist. 1967).

3. FLA. STAT. § 193.011 (1975).

4. FLA. STAT. § 193.011(2) (1975). This section provides that the assessor must take into consideration applicable land use regulations or moratoria restricting development or improvement of property.

5. FLA. STAT. § 193.011(8) (1975). The phrase "net proceeds of the sale" is defined as the sum of money received by the seller after deduction for all of the usual and reasonable fees and costs of the sale, including the costs and expenses of financing.

6. FLA. STAT. § 193.011 (1975).

7. 316 So. 2d 59 (Fla. 4th Dist. 1975).

County. Evidence revealed that the Osceola property was being used a "[a] buffer to commercial development . . . , a vast water storage area . . . for flood control and conservation . . . [and] a psychological mind conditioner for the millions of visitors to the theme park."[8]

The appraiser valued Disney's Osceola property at the same rate as neighboring properties which were zoned agricultural and held only for speculation. Disney contended that the appraiser failed to consider either the present use of the property or the highest and best use to which the property could be expected to be put in the immediate future.[9] Additionally, Disney alleged that the assessor failed to consider the quantity and size of the property.[10]

The court in reaching its decision reasoned that for unused land held only for speculation it was appropriate to consider the best possible future use as an "expected" use in calculating value. Since Disney was using the land for a bona fide purpose and was expected to continue to use it for that purpose, the appraiser erred in figuring value based on the same rate as the neighboring properties, which had no fona fide use. The District Court of Appeal, Fourth District, held[11] that in making an assessment *all* eight factors must be considered, that the "use" factor particularly was entitled to "great weight,"[12] and that the assessor erred in considering the best possible use where such a use was not "expected."[13]

The court's reasoning seems sound, but it raises another possible consideration. If the land in Osceola County is used in part as a "psychological mind conditioner,"[14] then it could be considered part of the theme park. Accordingly, it could be taxed under the rationale of *Homer v. Dadeland Shopping Center, Inc.*,[15] a case in which the Supreme Court of Florida valued a parking lot at the same rate as a shopping center, on the theory that they were an integral unit. Using the *Dadeland* rationale in *Disney*, the land providing the

8. *Id.* at 61.

9. FLA. STAT. § 193.011(2) (1973).

10. FLA. STAT. § 193.011(4) (1975).

11. The Fourth District adopted the final judgment prepared by the circuit court judge as its official opinion.

12. 316 So. 2d at 62.

13. The court followed the definition of use as construed in Lanier v. Overstreet, 175 So. 2d 521 (Fla. 1965). Under that case only immediately expected, not potential or reasonably susceptible uses, are subject to consideration. *Id.* at 524.

14. 316 So. 2d at 61.

15. 229 So. 2d 834 (Fla. 1970).

setting for the theme park could be viewed as an integral part of the park itself, and therefore, taxed not as agricultural property but as part of the park.

In another case involving the present and immediate future use of property, *Miami Atlantic Development Corp. v. Blake,*[16] the court upheld the assessment in question. The taxpayer executed and recorded a declaration of condominium for its luxury residential high rise on the twenty-ninth of December of the year in question. The property appraiser assessed the building as a condominium for the next taxyear, which began on the first of January. The taxpayer contended that since the building actually was being operated as an apartment building on the first of January, it should have been assessed as such, rather than as a condominium. The District Court of Appeal, Third District, rejected that argument because the statute requires that the assessor consider the highest and best use to which the property could be expected to be put in the immediate future,[17] and the declaration of condominium resolved any question of the expected immediate future use of the high rise building.[18]

Blake v. Farrand Corp.[19] also considered the applicaton of the just valuation statute. In that case the taxpayer contested as excessive the assessment of its real property by an appraiser because a building moratorium precluded utilizing the land for the high density purposes for which it was zoned. The trial court agreed with the taxpayer, ruling that the assessment had been made arbitrarily without reference to the factors enumerated in the just valuation statute.[20] The trial court fixed an assessment at a figure between the values testified to at trial. The appraiser did not contest the trial judge's ruling that the assessment had been arbitrary, but rather appealed on the ground that the court cannot fix an assessment between the values testified to at trial. The District Court of Appeal, Third District, affirming the trial judge's action, held that if substantial evidence is introduced demonstrating that the assessment is erroneous, the court may reduce it.

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16. 334 So. 2d 29 (Fla. 3d Dist. 1975).

17. FLA. STAT. § 193.011(2) (1975).

18. The court also noted that within several months after the first of January the first sale of a condominium unit had taken place. However, this hindsight view should have no relevance since the standard the statute prescribes is based on the expected use of the property as of the first of January.

19. 321 So. 2d 118 (Fla. 3d Dist. 1975).

20. *Id.* at 119.

In *Disney,* the decision was for the taxpayer and in *Miami Atlantic,* against. The same test was employed in both cases, that is, whether assessment had been based on the highest and best use to which the land could be *expected* to be put. Thus, while the manner in which seven of the eight factors for just valuation are to be considered by the appraiser remains to be judicially determined, the use factor has been clarified. For the use factor the appraiser should look to actual, *expected* use in considering the valuation of a property. *Farrand Corp.* has provided that where it is established that an assessor has given insufficient consideration to the eight factors in making his valuation, the court may adjust the valuation if adequate evidence is provided by the parties.

2. APPORTIONMENT OF COMMON AREAS

Department of Revenue v. Morganwoods Greentree, Inc.[21] considered the issue of assessment of taxes on the common areas of housing projects. In *Morganwoods* the residents of the housing project in question each owned connected townhouses. These individual owners held fee simple title to their houses and to the lots upon which their houses were located. The housing project also contained common areas comprised of landscaped areas, parking areas, and recreational facilities. The taxpayer, Tampa Villas, held fee simple title to these common areas, and pursuant to a declaration, was responsible for their maintenance. Each dwelling unit owner was required under the declaration to pay a maintenance assessment to the plaintiff. The declaration granted each residential owner express easements in the common areas for ingress and egress, lateral support, vehicular parking, and recreation. The declaration also regulated the use of the areas in question.

The property appraiser levied 1973 ad valorem taxes against Tampa Villas on the common areas through use of the cost method,[22] which is the price an owner paid for property and the replacement value of the improvements thereon. The trial court, granting a partial summary judgment to the plaintiff, held that the Florida Constitution[23] and the appropriate implementing statute[24]

21. 341 So. 2d 756 (Fla. 1976).

22. The cost method is one of the eight factors to be taken into consideration in arriving at "just valuation" under Florida Statutes section 193.011 (1975).

23. FLA. CONST. art. VII, § 4. This section provides for the "just valuation of all property for ad valorem taxation."

24. FLA. STAT. § 193.011 (1975).

required the appraiser to consider the restrictive encumbrances held in the common areas by the lot owners when valuing those areas for ad valorem taxation.[25] The trial court ordered the appraiser to re-evaluate the property accordingly. The Supreme Court of Florida affirmed.

The supreme court grounded its affirmation of the trial court's decision to tax each residential unit for the benefit of the easements on the concept "that the residential units . . . [were] not usable without the common areas."[26] The court found the two "entwined with each other"[27] and analogized to the case of *Homer v. Dadeland Shopping Center, Inc.*[28]

In *Dadeland,* lessees rented space in a shopping center from the taxpayer and secured for their customers the right to use parking areas in the center. The supreme court found that the stores and parking lots were so interrelated that "the land used for the parking area . . . [was] an integral part of the shopping center and just as important to its development as the land upon which the buildings . . . [were] erected."[29] Similarly, in *Morganwoods,* the court found that the common areas to be an integral part of the townhouses; therefore the value of one had to be included in the computation of the value of the other.[30]

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25. The supreme court stated that it was unclear from the record to what extent the beneficial use of the common areas and easements therein were included in the assessed value of the dwelling unit.

26. 341 So. 2d at 759.

27. *Id.*

28. 229 So. 2d 834 (Fla. 1970).

29. 341 So. 2d at 759 (quoting Homer v. Dadeland Shopping Center, Inc., 229 So. 2d at 837).

30. The *Morganwoods* court noted that in *Dadeland* the supreme court upheld the appraiser's failure to value the restrictive convenants. It could be contended that this is the factor of *Dadeland* for which the supreme court in *Morganwoods* is citing the case. If this contention were true, then it would support the proposition that the court wants to tax Tampa Villas on all the common areas rather than making the townhouse owners liable. The *Morganwoods* case, however, seems to indicate that it was the property appraiser's challenged action which was overturned by the trial court, and affirmed by the supreme court. Furthermore, any reliance by the court on *Dadeland* to justify not severing the easement for tax purposes is misplaced. The reason the court disregarded the easements in the parking areas in Dadeland when valuing the property was because the parking areas were considered an essential part of the store rentals. As such this commercial property produced the income stream (rental income) on which basis the property could be valued for taxation. Florida Statutes section 193.011(7) (1975) provides that the income from the property is one of the factors an assessor should take into consideration in arriving at just valuation. Consistent with this reasoning is the distinction between *Dadeland* and *Morganwoods* in terms of the encumbrance. In *Dadeland* due to the close tie between the stores and the parking areas, the

In order to carry out the rule laid down in the case, the supreme court directed the tax appraiser to "assess the value of the common areas separately with an adjustment being made in the value of each residential unit,"[31] through the apportionment of the common areas.

The supreme court found that the appraiser did consider the effect of the easements in valuing the residential units,[32] but invalidly exercised "his authority"[33] when he "did not adjust his valuation accordingly on the servient common areas"[34] of Tampa Villas. The supreme court pointed out that regardless of the method of assessment, the primary rule is that "the total assessed value of the entire property should equal its just full value taken as a whole."[35] Therefore, the aggregate tax liability of the individual owners and Tampa Villas should equal the initial valuation, as computed under the cost method.

Lastly, the supreme court stated that despite the adjustment in valuing the residential units, "the responsibility of collecting the taxes" on the common areas falls on Tampa Villas, the titleholder, "through the assessment authority of its declaration."[36] This direction in the case is due apparently to the requirement that each piece of property be liable for the taxes placed upon it. The supreme court may have been concerned with the proper placement of a lien in the

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lessee presumably was paying for the value of parking rights when he paid rent, and to tax him on the value of his encumbrances would have been to charge him again. Indeed, it was the parking areas themselves which were an integral part of generating the taxpayer's income. Therefore, the easements therein really were no different than those created by the leases of the stores themselves. In *Morganwoods*, however, since the unit owners were not renting the property, there was no effect on the rental of the common areas. Likewise, the easements were not producing income to the taxpayer as in the *Dadeland* case.

31. 341 So. 2d at 759.

32. The court stated that the general property tax law "seeks payments from only one owner," and despite mortgages or leases on the property a landowner will be taxed as if he owns the property in fee simple. The court emphasized, however, an exception to this common law principles: "[A]n outstanding, appurtenant easement interest must be considered in determining the property's tax value." *Id.* at 758 n.4. As a result, the court concluded that "[a]n encumbrance or restriction such as an easement will not per se reduce the assessment value of land . . . . Rather, "[t]he encumbrance becomes one factor among many the assessor must consider in determining the just value of the property to be taxed." *Id.* at 758.

33. *Id.* at 759.

34. *Id.* The court's directions seem to indicate that the assessor should value the property via the cost method and apportion the total, which benefited the townhouses, among their owners. The assessor then would subtract this total from the assessment on the common area.

35. *Id.* at 758.

36. *Id.* at 759.

event of the nonpayment of taxes. Normally, a lien would be placed on the townhouse if the taxes levied on it were not paid. The court probably believed that it would be improper to place a lien for the value of the easements in the common areas either on a townhouse or on the common areas themselves. By placing responsibility for collection on the taxpayer owning the common areas, the court apparently believed enforcement could best be ensured through the taxpayer's "continuing lien"[37] on each residential unit.

If the court's desire was to collect the taxes in the easiest manner, at least two methods seem less complex. First, the appraiser could value the townhouses utilizing the fair market value approach.[38] In utilizing fair market value, courts normally look to factors such as the price for which the property would sell or the price for which similar property with similar facilities has been selling (comparable sales).[39] Second, the appraiser could charge each townhouse owner his pro rata share of the value of the common areas. If the owner failed to pay the tax on the common areas, the appraiser could place a lien on his townhouse under the court's recent decision in *Williams v. Jones*[40] allowing for the attachment of a taxpayer's nonassessed property.[41]

3. DUE PROCESS AND EQUAL PROTECTION

The Supreme Court of Florida in *Deltona Corp. v. Bailey*[42] dealt, *inter alia,* with a property tax challenge based on equal protection and due process grounds.[43] In its due process claim the taxpayer alleged that it lacked sufficient time to obtain a proper review of the increased tax assessments that had been placed upon its numerous parcels of land.[44] Deltona, the taxpayer, did not assert that the defendant, the property appraiser, had failed to comply

37. *Id.* at 757.

38. Florida Statutes section 193.011(1) (1975) labels this "the present cash value of the property." Fair market value is the price a willing buyer would pay a willing seller for the property. Staninger v. Jacksonville Expressway Auth., 182 So. 2d 483, 486 (Fla. 1st Dist. 1966).

39. McNayr v. Claughton, 198 So. 2d 366 (Fla. 3rd Dist. 1967).

40. 326 So. 2d 425 (Fla. 1975), *appeal dismissed,* 97 S.Ct. 34 (1976).

41. *See infra* section I, D, 2.

42. 336 So. 2d 1163 (Fla. 1976).

43. The other issues involved the prospective application of Interlachen Lakes Estates, Inc. v. Snyder, 304 So. 2d 433 (Fla. 1974).

44. The taxpayer received notice that over 8,000 parcels of land had been increased in assessment.

with statutory notice and review requirements.[45] Rather, the taxpayer contended that the statutes themselves were unconstitutional as applied to an owner of numerous parcels of land. The Supreme Court of Florida noted that the statutory deadlines in question previously had withstood due process challenges.[46] Furthermore, the court stated that the deadlines were necessary for the proper functioning of the tax collection system. The court held that the fact the "deadlines work a hardship in situations where numerous parcels of property are concerned is not a basis for . . . [establishing a violation] of due process."[47]

A basic tenet of Florida ad valorem taxation law is that a taxpayer's property must be assessed at one hundred percent of its actual fair market value. A mere showing that parcels of other taxpayers are assessed at a lesser amount will not induce a court to reduce an assessment below one hundred percent.[48] The Supreme Court of Florida, however, first in *Dade County v. Salter*[49] and later in *Southern Bell Telephone & Telegraph Co. v. County of Dade*,[50] was willing to grant such relief when systematic discrimination against the taxpayer was at issue.

In *Deltona* the supreme court held that the taxpayer's allegation that its property was assessed at a rate higher than that of similar properties in the county was insufficient to merit relief on equal protection grounds. The court indicated that in order for Deltona to have alleged a sufficient cause of action based on the equal protection issue, it would have had to allege that substantially all other property in the county systematically was assessed at a lesser value than its own property.[51]

The distinction drawn by the supreme court concerning the significance of the *Southern Bell* and *Salter* decisions, both of which found denials of equal protection, is noteworthy.[52] Southern Bell was granted relief, although its property was assessed at one hundred

45. FLA. STAT. §§ 194.011, .032 (1975).

46. The court cited Rudisill v. City of Tampa, 151 Fla. 284, 9 So. 2d 380 (1942); Dade County v. Dupont Plaza, Inc., 117 So. 2d 849 (Fla. 3d Dist.), *rev'd on other grounds*, 125 So. 2d 564 (Fla. 1960).

47. 336 So. 2d at 1169.

48. *Id.* at 1167. *See also* Walter v. Schuler, 176 So. 2d 81 (Fla. 1965).

49. 194 So. 2d 587 (Fla. 1967).

50. 275 So. 2d 4 (Fla. 1973).

51. 336 So. 2d at 1168.

52. *Id.*

percent of just valuation, because it demonstrated that *all* real property in the county was assessed at a median ratio ranging from approximately eighty-one to eighty-three percent. Similarly, in *Salter* the complaint alleged that, while plaintiff's property was assessed at approximately eighty-seven percent of just valuation, the property appraiser systematically had assessed *all* property in the county at approximately forty-seven percent of just valuation.

Both *Southern Bell* and *Salter* are based on a discrimination concept in that the appraiser set out to tax the plaintiffs at a higher rate than other taxpayers. The supreme court aptly identified the factor of *systematic* assessment of other property at a lower level than the plaintiff's property as the key requirement missing in Deltona's allegation. In *Deltona* counsel for the taxpayer either erred in not following the standard required for a sufficient allegation of a denial of equal protection or believed that the plaintiff was incapable of proving the systematic discrimination required by the standard.

Another equal protection assessment problem was decided by the Supreme Court of Florida in *Spooner v. Askew*.[53] In that case the Gadsden County Board of Tax Adjustment conducted a hearing at which it adopted resolutions which in effect reduced the valuation of all property in the county by thirty percent.[54] The Department of Revenue refused to follow the board's recommendation on the ground that the board's power was limited to making recommendations for reductions of valuation on an individual basis. The taxpayers filed a class action for injunctive and declaratory relief on behalf of all ad valorem taxpayers in the county. The trial court granted partial relief, reducing the assessed value of the taxpayers' property by twelve percent.

The Supreme Court of Florida reversed the trial court and held that there was no statutory basis for the county board's action in adjusting assessments on an across-the-board basis. The court did not agree that there was a violation of equal protection although Gadsden County's taxpayers were assessed on approximately full fair market value while the Department of Revenue had approved tax rolls for other counties containing "assessments below the con-

53. [1976] FLA. L.W. (Jud. & Ad. Res. Assoc., Inc.) 1011 (S. Ct. Op.).

54. The basis for the board's action was its conclusion that lands within Gadsden County were assessed at a considerably higher rate than similar lands in certain neighboring counties.

stitutionally required 'just valuation.' "[55] Furthermore, the court found no reliable evidence justifying a reduction of all assessments by thirty percent. It added that "[t]he Board's concerns for regional assessment parity are wholly irrelevant to its intra-county function in the scheme of the tax assessment process."[56]

The supreme court said that a taxpayer taxed at or under one-hundred percent of fair market value has no standing to complain about a lower assessment level being applicable to taxpayers of another taxing jurisdiction. The court distinguished *Dade County v. Salter*[57] and *Southern Bell Telephone & Telegraph Co. v. County of Dade*,[58] in which the court provided relief to taxpayers who had been assessed at approximately one hundred percent of fair market value while others in their jurisdictions had not been assessed at full value. The court distinguished those cases because the officials there had not performed their duty of assessing property at full cash value. The court said that in *Spooner* the taxpayers' complaint centered on the official performing his responsibility too well. The supreme court concluded that although the legislature's goal was uniformity in assessment, the fact that the implementing "procedures had not evolved to the point of flawless harmony . . . was not a basis to conclude that . . . [the] taxpayers were denied equal protection of the law under either the Florida or Federal Constitutions."[59]

The recent decisions of the Supreme Court of Florida in the *Deltona* and *Spooner* cases illustrate the hesitancy of that court to find denials of equal protection and due process. These cases require a showing, not only of a difference in assessments, but even of systematic discrimination against the taxpayer, to justify relief.

B. *Exemptions*

1. EDUCATION

Florida Statutes chapter 196 (1975)[60] provides for tax exemptions for certain properties where justified by particular public poli-

55. [1976] FLA. L.W. at 1012.
56. *Id.* at 1012-13.
57. 194 So. 2d 587 (Fla. 1966).
58. 275 So. 2d 4 (Fla. 1973).
59. [1976] FLA. L.W. at 1013.
60. FLA. STAT. ch. 196 (1975), *as amended by* FLA. STAT. ch. 196 (Supp. 1976).

cies. The scope of one such exemption, education,[61] has been considered in several recent cases. In *Walden v. Berkeley Preparatory School, Inc.*,[62] the District Court of Appeal, Second District, held that a headmaster's residence was exempt from taxation, although it was not used exclusively for either instruction or learning. The court found it sufficient that there was regular and frequent use of the property for educational purposes and that the residence helped to foster a personal relationship between the headmaster and students which was important to the educational process.

In *Walden v. University of South Florida Foundation*[63] part of the taxpayer's property was used for educational purposes and part was used as an orange grove.[64] The trial court severed the orange grove from the rest of the property and held that the taxpayer was liable for taxes on the grove. The District Court of Appeal, Second District, reversed in part, holding that under the applicable statute[65] the trial court should have determined the ratio of the property's nonexempt use to that of the exempt use and apportioned the exemption accordingly.

2. AGRICULTURE

The agricultural classification is not a true exemption in that the property is not exempt from taxation, but rather is taxed at a lower rate. The Supreme Court of Florida upheld the constitutionality of the agricultural classification statute[66] in *Straughn v. K & K Land Management, Inc.*[67] The circuit court had ruled that the agricultural classification provision was unconstitutional for two reasons. First, it found that the statute unlawfully delegated legislative authority. Second, the circuit court held that the exemption act contravened the constitutional requirement that assessment be made solely on the basis of character or use. The unlawful delegation issue concerned a provision of the law which enabled a land-

61. FLA. STAT. §§ 196.192, .198 (1975).

62. 337 So. 2d 1029 (Fla. 2d Dist. 1976).

63. 328 So. 2d 460 (Fla. 2d. Dist. 1976).

64. Five acres out of a thirty acre tract were used for an orange grove from which the taxpayer received approximately $200 a year from the sale of citrus fruit.

65. FLA. STAT. § 196.192(2) (1975). This section provides that "[a]ll property used predominantly for exempt purposes shall be exempted from ad valorem taxation to the extent of the ratio that such predominant use bears to the nonexempt use."

66. FLA. STAT. § 193.461 (1975).

67. 326 So. 2d 421 (Fla. 1976).

owner, by a showing of special circumstances, to rebut a presumption of lack of bona fide agricultural use. The supreme court stated that the criteria in the statute[68] for the determination of taxable status sufficiently limited the assessor's discretion; therefore, there was no impermissible delegation. Concerning the character and use question, the supreme court held that there is no mandatory requirement that assessment be made solely on the basis of use. The court noted that the special circumstances rule protects the interests of both property owners and tax appraisers.[69]

The District Couut of Appeal, First District, considered the assessment of agricultural timberlands[70] in *St. Joe Paper Co. v. Conrad.*[71] Under Florida Statutes section 195.002 (1975), the Department of Revenue has authority to establish measures of value for property appraisals.[72] Property appraisers in making assessments are charged by that statute with following the standard measures of value established by the Department. Furthermore, the burden is upon the appraiser "refusing to follow such standards to overcome the presumption [of the standards' validity] by [a] preponderance of the evidence."[73] The property appraiser in *St. Joe* did not follow the standard measures of value. The First District held that the presumption that the standard measures of value should be utilized is not shifted where the tax assessor is unable to relate any standards or criteria which he used to make his assessments. In *St. Joe* the appraiser's educated guesses based on aerial photographs, since they lacked independent appraisal by the county's expert witnesses, were found insufficient to overcome the burden of proof established by the statute. The court stated the rule that the

68. Florida Statutes section 193.461(3) (1975) lists the factors the tax assessor may consider when deciding if the property qualifies for an agricultural tax exemption. These factors are:

> (1) the length of time the land has been utilized agriculturally; (2) the continuity of the use; (3) the purchase price paid; (4) size as it relates to agricultural use; (5) extent of commercial agricultural practices; (6) existence of a lease and the nature of it; and (7) other factors that may become applicable.

69. For an application of the statute, see Walden v. Fletcher Ave. Dev. Corp., 313 So. 2d 65 (Fla. 2d Dist. 1975).

70. FLA. STAT. § 193.461 (1975).

71. 333 So. 2d 527 (Fla. 1st Dist. 1976).

72. Florida Statutes section 195.002 (1975) requires the Department of Revenue to exercise a supervisory role over the assessment and valuation of property, so that it is valued according to its just valuation. In pursuit of this power, Florida Statutes section 195.032 (1975) provides for the establishment of standards of value.

73. FLA. STAT. § 195.032 (1975).

property appraiser has "to overcome by a preponderance of the evidence the presumption that an appraisal through the use of such standards is superior to the appraisal methods used by him in making his assessments of the agricultural lands involved."[74]

C. *Leaseholds*

1. PROPERTY SUBJECT TO TAXATION

Several recent cases[75] interpreted the new statute defining property subject to taxation[76] as substantially changing Florida law with regard to the taxation of leasehold interests.[77] Prior to enactment of the statute the leading case in the leasehold area had been *Dade County v. Pan American World Airways, Inc.*[78] In that case the taxpayer, Pan American, brought suit against the county contesting the legality of taxing its leasehold interests at Miami International Airport. The primary issue confronting the court[79] was

74. 333 So. 2d at 531.

75. Volusia County v. Daytona Beach Racing & Recreational Facilities Dist., 341 So. 2d 498 (Fla. 1976); Williams v. Jones, 326 So. 2d 425 (Fla. 1975); *See also* Dade County v. Marine Exhibition Corp., 330 So. 2d 459 (Fla. 1976).

Several earlier cases found less significance in the adoption of Florida Statutes section 196.001(2) (1975). *See, e.g.*, Walden v. Hertz, 320 So. 2d 385 (Fla. 1975); City of Tampa v. Walden, 323 So. 2d 58 (Fla. 2d Dist. 1975); Maccabee Investments, Inc. v. Markham, 311 So. 2d 718 (Fla. 4th Dist. 1975), *quashed* [1976] FLA. L.W. (Jud. & Ad. Res. Assoc., Inc.) 74 (S. Ct. Op.). The viability of these cases is questionable in light of the supreme court's decisions in Volusia County v. Daytona Beach Racing & Recreational Facilities Dist. and Williams v. Jones.

76. FLA. STAT. § 196.001(2) (1975). This section provides that all leasehold interests in property of the United States, state or political subdivision thereof, municipality, or other political body corporate of the state shall be subject to taxation unless expressly exempt.

77. In this context the term "leasehold interests" applies where a nonpublic body is renting real property from a public entity.

78. 275 So. 2d 505 (Fla. 1973).

79. A preliminary consideration of the court was whether the Florida Constitution, FLA. CONST. article VII, section 10(c), makes all leaseholds financed by revenue bonds taxable. That section provides, *inter alia*, that capital projects financed through revenue bonds shall be subject to ad valorem taxation to the same extent as privately owned property. The *Pan American* court held that section 10(c) required implementation by the legislature before it became effective.

Additionally, the court in *Pan American* was faced with a threshold question concerning the taxability of the particular leasehold interests in controversy. The court held that the leases, generally made in 1962 and subsequent years, were covered by a 1961 statute. 1961 Fla. Laws ch. 61-266, § 1 (repealed and replaced by 1971 Fla. Laws ch. 71-133, § 15 (codified at FLA. STAT. §§ 196.199(2)(a), 196.012(5) (1975)). This statute imposed taxes on property which was exempt or immune from taxation but was used by private interests in connection with a profitmaking venture.

whether the leasehold interests were utilized exclusively for a public purpose. The Supreme Court of Florida held that Pan American exclusively used its facility to fulfill a "public purpose." The court held that the applicable test for determining the existence of a public purpose was satisfied where projects are primarily and predominantly for the public benefit, although there might be an incidential private purpose.[80] In *Pan American* the court implied that regardless of Pan American's motivation and the profits it obtained from its facility at Miami International Airport, the controlling factor mandating an exemption was the fulfillment of a public benefit.

The new statute[81] providing for the taxation of leasehold interests owned by public bodies first was tested in *Straughn v. Camp.*[82] That case held that the passage of the leasehold provision[83] removed the public purpose exemption where the use of the property provided little public benefit.[84]

The taxable status of leasehold interests was upheld again by the Supreme Court of Florida in *Williams v. Jones.*[85] There, the supreme court considered the scope of the exemptions provided by the leasehold taxation statutes.[86] *Williams* stated that the new statute's[87] practical effect was to remove exemptions from "certain

80. The court cited Daytona Beach Racing & Recreational Facilities Dist. v. Paul, 179 So. 2d 349 (Fla. 1965), as authority for this proposition.

81. FLA. STAT. § 196.001 (1975).

82. 293 So. 2d 689 (Fla. 1974).

83. 1971 Fla. Laws ch. 71-133, § 16 (codified at FLA. STAT. § 196.001 (1975)). Both the session law and the *Camp* court refer to Florida Statutes section 192.010. Although this section was never codified it is substantively encompassed in Florida Statutes section 196.001 (1975).

84. In *Straughn v. Camp,* approximately 700 of the 750 leased sites in question had single family residences on them. Therefore, the supreme court was able to avoid consideration of the public use question, as presented in Dade County v. Pan American World Airways, Inc., 275 So. 2d 505 (Fla. 1973), since the private dwellings did not serve a public purpose. *See* City of Tampa v. Walden, 323 So. 2d 58 (Fla. 2d Dist. 1975). *Straughn v. Camp* also involved extensive discussion on the effect of the repeal of the statute granting a special exemption to the type of property in controversy.

85. 326 So. 2d 425 (Fla. 1975). This case is a successor to Straughn v. Camp, 293 So. 2d 689 (Fla. 1974), and the leaseholds in question are the same as those at issue in that case.

86. FLA. STAT. §§ 196.012(5), (6), .199(2)(a) (1975).

87. FLA. STAT. §§ 196.001(2), .199(2)(a) (1975). The latter section provides:

> Property owned by the following governmental units, but used by nongovernmental lessees, shall only be exempt from taxation under the following conditions:
> (a) Leasehold interests in property of the United States, of the state or any of its several political subdivisions, or of municipalities, agencies, authorities, and other public bodies corporate of the state shall be exempt from ad valorem taxation only when the lessee serves or performs a governmental, municipal, or public

users"[88] of property thereby imposing ad valorem taxation upon them consistent with that imposed on owners making similar uses of private property. In *Williams* the leaseholders maintained that they were fulfilling a public purpose as defined by Florida Statutes section 196.012(5) (1975).[89] The supreme court rejected the public purpose argument stating that "[t]he operation of the commercial establishments represented . . . [here is] purely proprietary and for profit"[90] and that the operations of the commercial establishments on the leaseholds "are not governmental functions."[91] The court pointed out that such establishments would not be exempt if they were located on privately owned land so no rationale existed for exempting such profitmaking establishments on publicly owned land.

Additionally, the court held that the exemptions contemplated by the Florida statutes,[92] "relate to 'governmental-governmental' functions as opposed to 'governmental-proprietary' functions."[93] The accepted definitions of governmental functions and proprietary functions were set forth by the Supreme Court of Florida in *City of Clearwater v. Caldwell.*[94] In that case the court stated that purely governmental authority must be utilized for a *municipal purpose.* Power executed by a "municipality in a *proprietary* capacity . . . must be for a *public* purpose."[95] An example of an action that is proprietary rather than governmental is a municipality's operation of a utility.[96] The test for a governmental function is whether the governmental unit is acting in the same capacity as a private entity.

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purpose or function, as defined in s. 196.012(5). In all such cases all other interests in the leased property shall also be exempt from ad valorem taxation.

88. 326 So. 2d at 432.

89. This section of the statute provides in pertinent part:

Governmental, municipal, or public purpose or function shall be deemed to be served or performed when the lessee under any leasehold interest created in property of the United States, the state or any of its political subdivisions, or any municipality, agency, authority, or other public body corporate of the state, is demonstrated to perform a function or serve a governmental purpose which could properly be performed or served by appropriate governmental unit, or which is demonstrated to perform a function or serve a purpose which would otherwise be a valid subject for the allocation of public funds.

90. 326 So. 2d at 433.

91. *Id.*

92. FLA. STAT. §§ 196.012(5), .199(2) (1975).

93. 326 So. 2d at 433.

94. 75 So. 2d 765 (Fla. 1954).

95. *Id.* at 767 (emphasis added).

96. *See* Erdis v. Sebring Utils. Comm'n, 237 So. 2d 585 (Fla. 2d Dist. 1970).

Volusia County v. Daytona Beach Raceway & Recreational Facilities District[97] presented the Supreme Court of Florida with an even more complex set of facts concerning the issue of a public purpose exemption for use of a leasehold interest. The property involved, Daytona International Speedway, presented a situation significantly different from that of the houses and commercial establishments in *Straughn v. Camp*[98] and *Williams v. Jones.*[99] In fact, the public purpose issue concerning Daytona Raceway seems analagous to the issue previously before the court concerning Pan American's facilities at Miami International Airport in *Dade County v. Pan American World Airways, Inc.*[100] The Daytona International Speedway is of obvious and particular importance to the Volusia County area because it is critical in increasing employment and bringing tourists to the region. Likewise, Miami International Airport is more than a typical transportation facility[101] since many airlines have regional control facilities there, and it brings the vital tourist trade to South Florida. Given the closeness of the fact patterns of the *Daytona* and *Pan American* cases and the difference in results, a reconciliation of the cases should have seemed essential.

Rather than utilizing the established rule and extensive reasoning of its earlier decision in *Pan American* as a starting point, the supreme court in *Daytona* chose to start anew. In *Daytona,* the Supreme Court of Florida traced the history of the state's treatment of leaseholds in public property. After answering affirmatively the threshold question of the taxability of the taxpayer's leasehold interests, the court considered the secondary issue of whether the property in question had been exempted. It noted that the constitution of 1968 had "limited the municipal purpose exemption[102] to

97. 341 So. 2d 498 (Fla. 1976).

98. 293 So. 2d 689 (Fla. 1974).

99. 326 So. 2d 425 (Fla. 1976).

100. 275 So. 2d 505 (Fla. 1973).

101. Pan American in its case implied that airports are per se "public purposes." It stated that modern airports render a public service similar to governmental functions, promoting the health, safety, and welfare of the people.

102. The Constitution of 1885 had provided that "[t]he property of all corporations . . . shall be subject to taxation unless such property be held and used exclusively for religious, scientific, municipal, educational, literary, or charitable purposes." FLA. CONST. art. XVI, § 16 (1885).

The Supreme Court of Florida had occasion to construe this provision of the 1885 Constitution with facts similar to those in Volusia County v. Daytona Beach Racing & Recreational Facilities Dist., 341 So. 2d 498 (Fla. 1976), in mind. It did so in Daytona Beach Racing &

'property owned by a municipality and used exclusively by it for municipal or public purposes.' "[103] The court stated the general rule "that all property is subject to taxation unless expressly exempt and such exemptions are strictly construed against the party claiming them."[104] Therefore, there was a presumption in *Daytona* that the leaseholds were not exempt.

The court pointed out that Florida Statutes section 196.199(2)(a) (1975) exempts "privately held leaseholds of governmental property from taxation 'only when the lessee' . . .[105] is demonstrated to perform a function or serve a governmental purpose which could properly be performed or served by an appropriate governmental unit, or . . . which would otherwise be a valid subject for the allocation of public funds."[106] The supreme court relied on the standards it had set for the leasehold interests involved in the cases of *Straughn v. Camp*[107] and *Williams v. Jones.*[108] These two cases, as interpreted by the court in *Daytona,* laid down a two-pronged nexus for testing whether property qualifies for an exemption under the governmental purpose definition.[109] The first part of the nexus, taken from *Straughn v. Camp,*[110] concerns the "use" factor. *Straughn v. Camp* stated that "[i]t is the utilization of leased property from a governmental source that determines whether it is taxable under the Constitution."[111] The court in *Daytona* added that the utilization factor "is determinative" in deciding whether the property is taxable.[112] For the second prong, the supreme court looked to the *purpose* of the lessee. *Williams v. Jones*[113] had found it determinative that the taxpayer's function was

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Recreational Facilities Dist. v. Paul, 179 So. 2d 349 (Fla. 1965). There the court held that the raceway was exempt from taxation because it was "a tourist and business attraction to the area," therefore giving the facility a "predominantly public purpose." 179 So. 2d at 355. Concerning the point that there was a distinction between the terms "municipal purpose" and "public purpose" the supreme court stated that "such distinction is without a difference." *Id.*

103. 341 So. 2d 498, 501 (Fla. 1976) (citing FLA. CONST. art. VII, § 3(a)).

104. 341 So. 2d at 502.

105. *Id.* (citing FLA. STAT. § 196.199(2)(a) (1975)).

106. *Id.* (citing FLA. STAT. § 196.012(5) (1975)).

107. 293 So. 2d 689 (Fla. 1974).

108. 326 So. 2d 425 (Fla. 1975).

109. FLA. STAT. § 196.012(5) (1975).

110. 293 So. 2d 689 (Fla. 1974).

111. 341 So. 2d 498, 502 (Fla. 1976) (quoting Straughn v. Camp, 293 So. 2d 689, 695 (Fla. 1974)).

112. 341 So. 2d at 502.

113. 326 So. 2d 425 (Fla. 1975).

"purely proprietary and for profit."[114] In applying the *Williams* test, the Supreme Court of Florida held that "[t]he lessee in the present case does not serve a governmental purpose. The Corporation's operation of the speedway 'is purely proprietary and for profit.' "[115] The court added that "[o]perating an automobile racetrack for profit is not even arguably the performance of a 'governmental-governmental' function" compared to the "governmental-proprietary" functions as contemplated under Florida Statutes sections 196.012(5) and 196.199(2)(a) (1975).[116] In *Williams* the taxpayer was performing a function that a private entity could have performed. Therefore, the court in *Daytona* properly found the purpose to be only a proprietary one.[117]

The test enunciated by the Supreme Court of Florida in *Daytona* is far more difficult for the taxpayer to meet to obtain a public purpose exemption than the one adopted in 1973 in *Dade County v. Pan American World Airways, Inc.*[118] This difficulty is particularly apparent in the test's second prong, the profit motive of the lessee, which runs completely counter to the *Pan American* test. In *Pan American* there was no evidence to suggest that Pan American World Airways, Inc. was operating its leasehold for any purpose other than that of making a profit. The court in effect characterized Pan American's profit goal as merely an incidental benefit to private interests which did not destroy Pan American's exemption.[119]

The profit motive oriented second prong of the *Daytona* test would seem to exclude exemptions under the public purpose doctrine for all but charitable, literary, religious, and scientific institutions.[120] Under this construction of the law,[121] it is difficult to imagine exactly what the legislature intended to exempt under the public purpose provision since those taxpayers who would be exempt under the provision[122] probably would have qualified under one of the tra-

114. 341 So. 2d at 502 (quoting Williams v. Jones, 326 So. 2d 425, 433 (Fla. 1975)).

115. 341 So. 2d at 502.

116. *Id.*

117. *See* City of Clearwater v. Caldwell, 75 So. 2d 765 (Fla. 1954).

118. 275 So. 2d 505 (Fla. 1973).

119. *Id.* at 512.

120. Charitable, literary, religious, or scientific institutions are exempt from taxation. FLA. STAT. § 196.196 (1975).

121. FLA. STAT. §§ 196.012(5), .199(2)(a) (1975).

122. *Id.*

ditional exemptions.[123] Apparently, the supreme court's answer to this incongruity is that through the court's interpretation, "all property used by private persons and commercial enterprises is subjected to taxation either *directly* or *indirectly* through taxation on the leasehold."[124] The court apparently believed that the legislature's intent was to exempt only those lessees engaged in noncommercial activity, thereby ignoring possible public benefits of other leaseholders.[125]

Probably the most significant aspect of the *Daytona* decision was articulated in a footnote in which the Supreme Court of Florida, in reference to the public purpose issue, held that section 196.001 of the Florida Statutes (1975) "supersedes the statutory provisions considered in"[126] *Dade County v. Pan American World Airways, Inc.*[127] That Florida statute, adopted in 1971,[128] provides that leasehold interests in property owned by governmental entities shall be subject to taxation unless expressly exempted.[129] It appears, however, that this statutory authority was not responsible for the different result in *Daytona*. If the new statute really was the key, it would have been unnecessary for *Daytona* to go through the same discussion as in *Pan American* concerning the public purpose question.[130]

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123. *See* FLA. STAT. § 196.196 (1975).

124. 341 So. 2d 498, 502 (Fla. 1976) (quoting Williams v. Jones, 326 So. 2d 425, 433 (Fla. 1975)).

125. If this were really what the legislature intended, it easily could have limited the exemption in explicit language to lessees not in a profitmaking business.

126. 341 So. 2d 498, 502 n.5 (Fla. 1976).

127. 275 So. 2d 505 (Fla. 1973).

128. 1971 Fla. Laws ch. 71-133 (codified at FLA. STAT. § 196.001 (1975)).

129. FLA. STAT. § 196.001 (1975). This section provides:

> Unless expressly exempted from taxation, the following property shall be subject to taxation in the manner provided by law:
>
> (1) All real and personal property in this state and all personal property belonging to persons residing in this state; and
>
> (2) All leasehold interests in property of the United States, of the state, or any political subdivision, municipality, agency, authority, or other public body corporate of the state.

130. In *Pan American* the supreme court seemed to indicate that it would have found the airline's facilities taxable if there had been a statute providing for the taxation of leaseholds in public property as related to revenue bonds.

Regarding projects financed by revenue bonds, the Florida Constitution, FLA. CONST. art. VII, § 10(c), pt. 2, provides:

> If any project [is] so financed, or any part thereof, is *occupied or operated by any private corporation*, association, partnership, or person pursuant to contract or lease with the issuing body, the property interest created by such contract or

Perhaps the difference in results between the two cases on the public purpose issue can be traced to a change in the composition of the supreme court. Justices Adkins and Roberts, in the majority in *Dade County v. Pan American World Airways, Inc.*, were the only members of that bench who were still on the court in *Daytona*. In *Daytona* the two justices dissented.[131]

In *Daytona*, the supreme court ignored its earlier per curiam decision affirming *Walden v. Hertz*.[132] *Walden* involved the leasehold of Hertz's automobile rental facility in the main terminal of the Hillsborough County airport. The supreme court affirmed Hertz's exemption from taxation on public purpose grounds.

Application of the *Daytona* test in *Hertz* would have brought about a different result. Clearly, Hertz's rental facility was a profit-making commercial venture and as such would have been denied exemption under *Daytona*. The importance of the makeup of the Supreme Court of Florida, illustrated by *Daytona*, was apparent again in *Walden v. Hertz*.[133] Justices Adkins and Roberts, who were in the majority upholding the leasehold exemption in *Pan American*, were the only members of the supreme court to be a part of the majority opinion in *Walden v. Hertz*.[134]

Another important issue in *Daytona* was raised by the taxpayer's contention that it should be exempt "as a matter of

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lease shall be subject to taxation to the same extent as other privately owned property. (emphasis added)

The court in *Pan American* did not have to reach the issue of whether the Florida Constitution, FLA. CONST. art. VII, § 10(c), required implementation to become effective. It stated that the section did not apply to the circumstances of the case, because the revenue bond properties in controversy were created prior to the effective date of this constitutional provision. The *Pan American* court noted that this section of the constitution providing for taxation of leaseholds might require "implementation by the Legislature before it can become effective." 275 So. 2d at 508.

131. Their dissents were without opinion. 341 So. 2d 498, 502 (Fla. 1975).

132. 320 So. 2d 385 (Fla. 1975).

133. *Id.*

134. In *Walden v. Hertz*, 320 So. 2d 385 (Fla. 1975), the supreme court was composed of three circuit justices, and Justices Adkins and Roberts, Overton, and England. Only Justices Adkins and Roberts concurred in the majority opinion. All of the justices who were on the court in Daytona and did not hear the *Walden v. Hertz* case were in the majority in *Daytona* as was Justice England who dissented in *Walden v. Hertz* and Justice Overton, who wrote a special concurrence there.

In his special concurrence, Justice Overton was concerned about what he saw as the inconsistent position of the property appraiser in the case. The appraiser sought to tax Hertz's rental facility at the airport while not taxing the restaurants and newsstands in the terminal. Justice Overton added that he saw more logic in the position of Dade County, which as amicus curiae argued that Hertz, as well as the businesses in the terminal, should be taxed.

contractual right.[135] That argument was based on the City of Daytona Beach's agreement to "levy no tax upon the improvements constructed by the [District] or upon the leasehold estate . . . created [by the lease between the City and the District], so long as the same is held by . . .[a] public body."[136] The court answered by stating that the City of Daytona Beach was "without authority to bind the legislature";[137] hence, the lease was not effective in exempting the lessee from taxation.

Daytona and *Williams* relied upon Florida Statutes section 196.001 (1975) to justify limiting the scope of the public purpose exemption. The supreme court's two-pronged nexus test, especially the profit motive analysis, generally will restrict use of the exemption to relatively few nonprofit entities. This result may be inconsistent with the general purpose of exemptions, which is to foster beneficial public effects. The effects of the nexus test are contrary to the 1973 *Pan American* case and indicate that the Supreme Court of Florida's recent decisions may be attributable more to the change in the court's composition than to the adoption of section 196.001.

2. SUBSURFACE RIGHTS

Florida Statutes section 193.481 (1975)[138] provides for the taxation of oil, mineral, gas, and other subsurface rights. This statute has been construed in two conflicting decisions of the District Courts of Appeal.[139] The question presented in each case was

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135. 341 So. 2d 498, 502 (Fla. 1976).

136. *Id.* (quoting the contract between the City of Daytona Beach and the Daytona Beach Racing & Recreational Facilities District). (Brackets inserted by the supreme court). The District, one of the plaintiffs in this case, subsequently leased the property upon which the raceway was built to International Speedway Corp.

137. *Id.*

138. The relevant section reads as follows:

> Assessment of oil, mineral and other subsurface rights.—
>
> (1) Whenever the mineral, oil, gas, and other subsurface rights in or to real property in this state shall have been sold or otherwise transferred by the owner of such real property, or retained or acquired through reservation or otherwise, such subsurface rights shall be taken and treated as an interest in real property subject to taxation separate and apart from the fee or ownership of the fee or other interest in the fee. Such mineral, oil, gas, and other subsurface rights, when separated from the fee or other interest in the fee, shall be subject to separate taxation. Such taxation shall be against such subsurface interest and not against the owner or owners thereof or against separate interests or rights in or to such subsurface rights.

139. Fischer v. Sun Oil Co., 330 So. 2d 76 (Fla. 1st Dist. 1976); Straughn v. Amoco Prod. Co., 309 So. 2d 39 (Fla. 2d Dist. 1975).

whether the statute provides for the taxation of a leasehold interest in subsurface rights.

In *Straughn v. Amoco Production Co.*,[140] the taxpayer sought through a declaratory judgment action a determination that its leasehold interest was not subject to ad valorem real property taxation under the statute. The trial court, following the earlier supreme court decision in *Miller v. Carr*,[141] held that the leasehold interest constituted a mere "license to explore" and was not subject to the tax. The District Court of Appeal, Second District, reversed, distinguishing *Miller* and holding that the legislature could and did intend to tax such leasehold interests.

The court characterized the lease as containing two distinct parts—the right to explore the land and the right to extract from the land. The court distinguished the *Miller* case on the ground that it was only concerned with the right to extract.[142] However, such a distinction is artificial. The right to extract from the land naturally is dependent on the exploration thereof. The court should simply have discredited the *Miller* approach.

Amoco Production rejected the contention that the statute violated the Florida Constitution,[143] holding that a classification of this kind of leasehold interest as a "freehold" interest or estate in land

140. 309 So. 2d 39 (Fla. 2d Dist. 1975).

141. 141 Fla. 318, 193 So. 45 (1940).

142. In the *Miller* case the lessee contended that the lease constituted a "constructive severance of oil 'in place' and that title to the oil passed to the lessee." 141 Fla. at 324, 193 So. at 47. The supreme court construed the lease to be a "contract for the use of the realty for the purposes therein specified. It passed the right to produce oil from the land and nothing more." *Id.* The Second District is correct in that *Miller* is concerned not with the taxation of the minerals but with the alienability of the interest in the minerals which is defined as the right to produce. Therefore, it follows logically from *Miller* that any tax must be on the right to produce rather than on realty. *Amoco Production's* conclusion that the statute levies a tax on the "exclusive right to occupy, explore and probe the land *together with* its interest in such unsevered oil and minerals which, while so unsevered, remain part of the realty," 309 So. 2d at 42, is inconsistent with the consequences of the *Miller* logic.

143. FLA. CONST. art. VII, § 1(a). This section provides: "No tax shall be levied except in pursuance of law. No state ad valorem taxes shall be levied upon real estate or tangible personal property. All other forms of taxation shall be preempted to the state except as provided by general law." In *Fisher v. Sun Oil Co.*, 330 So. 2d 76 (Fla. 1st Dist. 1976), the court construed this section to mean that "the counties may levy ad valorem taxes upon real estate and tangible personal property in the county but all other forms of taxation are preempted to the state *unless by general law the county is given authority to levy such other taxes.*" *Id.* at 78. The court believed that the imposition of the county's tax on mineral leases was unconstitutional because it was levied, without a grant of authority from the state, on an interest in real property.

"would meet the test of a reasonable classification for a valid public purpose."[144] It thus held the leasehold interest to be one in real property and the tax to be on real property.

Amoco Production also held that the legislature intended to tax leasehold interests in subsurface rights. The court looked at the original wording of the section which included the phrase "not to include a leasehold interest in said subsurface rights."[145] Though that statute was declared unconstitutional on other grounds,[146] when the legislature reenacted a similar statute correcting the constitutional defect,[147] it dropped the phrase prohibiting the taxation of leasehold interests in subsurface rights. The court determined that this was "intentionally done for the purpose of *including* leasehold interests in the new enactment."[148] The court, therefore, upheld the application of the tax.

In *Fisher v. Sun Oil Co.*,[149] the taxpayer sought a declaratory judgment and an injunction against the imposition of a tax on its oil, gas, and mineral leasehold interests. The District Court of Appeal, First District, was presented with essentially the same problem as that before the Second District in *Amoco Production.* The trial court, like the trial court in *Amoco Production,* followed the *Miller* case,[150] and held that the leases were mere licenses to explore and produce, and were not interests in real property. On appeal, the taxing authority, apparently relying on the *Amoco Production* decision, argued that the deletion from the old statute[151] of the phrase "not to include a leasehold interest in said subsurface rights" when the legislature reenacted it in 1963,[152] indicated a legislative intent to tax those interests. The First District rejected this argument by pointing out that the new enactment in 1963 had added a phrase indicating that *"[s]uch taxation shall be against such subsurface interest* and not against the owner or owners thereof *or against separate interests or rights in or to such subsurface rights."*[153] The court

144. 309 So. 2d at 41.

145. 1957 Fla. Laws ch. 57-150, § 1.

146. Cassady v. Consolidated Naval Stores Co., 119 So. 2d 35 (Fla. 1960).

147. 1963 Fla. Laws ch. 63-355, § 1 (current version at FLA. STAT. § 193.481 (1975)). This statute was upheld as constitutional in Dickinson v. Davis, 224 So. 2d 262 (Fla. 1969).

148. 309 So. 2d at 42.

149. 330 So. 2d 76 (Fla. 1st Dist. 1976).

150. 141 Fla. 318, 193 So. 45 (1940).

151. 1957 Fla. Laws ch. 57-150, § 1.

152. 1963 Fla. Laws ch. 63-355, § 1 (current version at FLA. STAT. § 193.481 (1975)).

153. 330 So. 2d at 79.

concluded that the references to subsurface rights should be interpreted to mean taxation of the mineral fee estates, and not taxation of the mineral leases carved out of those estates. Because there were strong doubts about the proper interpretation of the statute, the court followed the general rule[154] that statutes imposing taxes must be liberally construed in favor of the taxpayer. Since it determined that the legislature did not intend to impose a tax, it was not necessary for the court to decide whether such a tax was prohibited by the Florida Constitution.[155]

It is submitted that the better view was expressed by the Second District in *Amoco Production.* In order for a leasehold interest in private property to be subject to ad valorem taxation, it must be either real estate or tangible personal property. The supreme court has decided that the "interests of lessees are neither tangible nor intangible personal property as presently defined,"[156] therefore, the leaseholds must be interests in realty if they are to be taxable at all.

The supreme court, in *Dade County v. Pan American World Airways, Inc.,*[157] recognized that a leasehold interest in oil, mineral, or other subsurface rights was taxable.[158] In fact, *Amoco Production* relied on the *Pan American* case.[159] Subsequently, in *Williams v. Jones,*[160] the supreme court referred to *Amoco Production, Pan American,* and *Park-N-Shop, Inc. v. Sparkman,*[161] and refused to accept the contention that the legislature was without power to classify the leasehold interests in question as real property.[162] It may be concluded, therefore, that the legislature is not constitutionally barred from taxing a leasehold interest in subsurface rights.

The next question is whether the legislature did tax such an interest. Both *Pan American*[163] and *Williams* use language which reflects the supreme court's belief that the legislature did tax such leaseholds. *Amoco Production* comes to the same conclusion based on its belief that the deletion of the phrase which exempts lease-

154. State *ex rel.* Riverside Bank v. Green, 101 So. 2d 805. (Fla. 1958); Overstreet v. Ty-Tan, Inc., 48 So. 2d 158 (Fla. 1950).

155. FLA. CONST. art. VII, § 1(a).

156. Park-N-Shop, Inc. v. Sparkman, 99 So. 2d 571, 574 (Fla. 1957).

157. 275 So. 2d 505 (Fla. 1973).

158. *Id.* at 509 n.2.

159. 309 So. 2d at 41.

160. 326 So. 2d 425, 430-31 (Fla. 1975).

161. 99 So. 2d 571 (Fla. 1957).

162. 326 So. 2d at 431.

163. 275 So. 2d at 509.

holds from application of the tax evidenced an "intentional" desire to tax the leaseholds.[164]

Since neither *Pan American* nor *Williams* found it necessary to make references to *Miller,* it is submitted that the portion of that case which classifies a lease as a right to extract as opposed to an interest in realty is discredited. Similarly, the *Fisher* interpretation, to the extent it relies on *Miller,* should be disregarded. A leasehold interest in subsurface rights should be regarded as creating an interest in realty. It also appears that the legislature meant to tax that interest. Therefore, the leasehold interest is subject to the tax.[164.1]

3. VALUATION

In *Williams v. Jones*[165] taxpayers contended that even if their leasehold interests were not exempt from taxation, the tax imposed by Florida Statutes section 196.001(2) (1975) was merely an ad valorem intangible personal property tax.[166] Their contention was based on the fact that none of the statutory provisions relied upon by the county in supporting taxation at real property rates expressly stated that "the leasehold estates in question are to be taxed 'as an interest in real property.' "[167] The Supreme Court of Florida in *Williams* indicated that it presumed that the legislature deemed it sufficient to provide that "leasehold interests in public lands shall no longer enjoy exemption from ad valorem taxation . . ." except as prescribed therein.[168] Therefore, the court held that Florida Statutes section 196.001(2) (1975) effectively taxed leasehold interests as real property.

The taxpayers alternatively argued that even if the state intended to tax leasehold interests as realty, it was without the power

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164. 309 So. 2d at 42.

164.1. While this article was being printed the supreme court announced a decision in Straugh v. Sun Oil Co., [1977] FLA. L.W. (Jud. & Ad. Res. Assoc., Inc.) 207 (S. Ct. Op.). This decision affirmed *Amoco Production* and reversed *Fisher* for essentially the reasons given in the portion of the text accompanying notes 156-164. This decision awaits action on a motion for rehearing.

165. 326 So. 2d 425 (Fla. 1975), *appeal dismissed,* 97 S. Ct. 34 (1976).

166. 326 So. 2d at 433. The rates for intangible personal property taxation are much lower than the rates for real property taxation. *Id.* at 431.

167. *Id.* at 433.

168. *Id.* at 435. In reaching such a conclusion, the court noted that it presumed that when the legislature enacted the statute, the legislature was cognizant of the existing law, as well as judicial constructions of former laws.

to do so.[169] The taxpayers relied on *Interlachen Lakes Estates, Inc. v. Snyder*[170] in support of the proposition that the legislature, assuming it had the power to tax the leaseholds, could not tax them at a value based on the fair market value of the property itself.[171] *Interlachen* held a statute invalid which provided for the valuation of unsold platted lands on the same basis as unplatted acreage, at least until sixty percent of the lands were sold.[172] The supreme court in *Williams* distinguished *Interlachen* by stating that *Interlachen* was limited to the proposition that the legislature is precluded from classifying property for taxation purposes at less than just valuation unless excepted by article VII, section 4 of the Florida Constitution.[173] The court added that an application of the relevant Florida enabling statutes[174] necessitated the result that "leasehold interests defined therein shall be taxed at a just valuation like all other property in the state."[175]

Although the court's conclusion that leasehold interests should be taxed as real estate is sound, the court's reasoning is questionable. The court stated that to accept the lessee's contention that the legislature lacked the power to classify leaseholds as real property would result in the taxation of such interests on the lower intangible personal property ad valorem scale. The court continued that this would have the effect of depriving political subdivisions from raising revenue from such sources in order to defray the costs of the services supplied to the users thereof.[176] The court's argument, however, seems predicated on the notion that taxes are a fee paid for services rendered. This premise disregards the true nature of taxation. In reality, taxes are imposed upon an individual whether or not he uses particular public services or indirectly benefits therefrom. For example, the fact that certain residents never use the public school system, which is responsible for a substantial part of their property tax burden, does not lower their tax liability. Conversely, a resident

169. *Id.* at 429.

170. 304 So. 2d 433 (Fla. 1973).

171. 326 So. 2d at 431.

172. 304 So. 2d at 435. *See* the analysis of *Interlachen* in *Williams*, 326 So. 2d at 431. *Interlachen* considered the validity of the Rose law, FLA. STAT. § 195.062 (1973).

173. 326 So. 2d at 431.

174. FLA. STAT. §§ 196.001(2), .199 (1975).

175. 326 So. 2d at 431.

176. *Id.* Examples of such services listed by the court include education, and fire and police protection.

who uses a vast amount of public services is not liable for proportionately greater taxes or necessarily any at all. For instance, if such a resident is either a nontaxpayer, because of economic circumstances, or a tax-exempt entity,[177] there is no legal responsibility for payment of taxes, regardless of the use of public services.

The *Williams* court in disagreeing with the intangible rate argument[178] added that the revenues derived from an intangible personal property tax constitutionally must be paid into the treasury of the state rather than that of the local political subdivision.[179] This requirement implies that the State of Florida would receive the benefit for the leaseholds' presence in the form of taxation, while the county would bear only the lessee's burden, that of consumption of public services.

The supreme court in *Williams* concluded that "[t]he legislature clearly has the power to classify [property] so that all property devoted to private use is treated on a parity and, therefore, there is an equitable distribution of the tax burden."[180] The court gave no indication of the source of this classification power. The existence of such a power implies that the legislature has the discretion of changing intangible personalty to tangible realty whenever it feels the conditions merit such a change. The court gave no evidence, however, that the incidence of the state collecting taxes on leaseholds would be either significant or inherently harmful to Volusia County or other particular counties. Even if such harm were present, the answer might be to have the state redistribute revenue collected through this intangible personal property tax. Such revenue sharing could be related to either the county's share of the intangible property or its burden due to the intangibles. Such revenue sharing could be similar to payments made by the federal government to the District of Columbia in exchange for the large amount of United States government property in that city which is immune from taxation.

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177. In Florida property used for charitable, literary, religious, or scientific purposes is exempt from property taxation. The criteria for these exemptions appear in Florida Statutes section 196.196 (1975).

178. In fact the *Williams* court went on to say that to tax the leaseholds as intangible personal property would be to establish an exemption to ad valorem real estate taxation where none existed. The court added that such an exemption would violate the equal protection provisions of the Florida and United States Constitutions.

179. *Id.* at 431-32. *See* FLA. CONST. art. VII, §§ 1, 9.

180. 326 So. 2d at 432.

The real rationale for defining the property in controversy as realty was mentioned only briefly by the court. Stated simply, previous case law has held that a leasehold is a separate and distinct interest, and therefore, amenable to taxation as real estate.[181] The reasoning for this view is consistent with the present general rule that a lease is considered to have created an estate in the land.[182]

After deciding that the leaseholds were taxable as real property, the court in *Williams* still had to determine the measure of taxation. The court considered whether ninety-nine year leases should be assessed according to the economic value[183] of the lease or by the fair market value of the fee simple.[184] Florida Statutes section 196.199(6) (1975)[185] states that property leased for ninety-nine years or more is deemed "owned" for purposes of taxation of leasehold interests. The court held that this statute controlled and that since a lease for ninety-nine years or more is "tantamount to ownership of the fee,"[186] the legislature's classification standard was reasonable.[187]

D. *Enforcement*

1. NOTICE

The State of Florida, through its agents, sells tax certificates on property belonging to those who have not paid their taxes.[188] The amount required to redeem the tax certificate is the total of all the costs of the applicant for the tax deed.[189] This amount constitutes

181. Hillsborough County Aviation Auth. v. Walden, 210 So. 2d 193, 195 (Fla. 1968).

182. *See* 2 R. BOYER, FLORIDA REAL ESTATE TRANSACTIONS § 35.01 (1976).

At common law the tenant was not regarded as having an interest in land. By 1500, however, the lessee was recognized clearly as having an interest in the land, and the lease itself was regarded essentially as a conveyance. *Id.*

183. Generally, leases are valued as to economic value, which normally involves capitalizing the value of the property over the term of the lease.

184. 326 So. 2d at 436.

185. This section has been renumbered as Florida Statutes section 196.199(7) (Supp. 1976).

186. 326 So. 2d at 436.

187. The court also noted that the classification contested in *Williams* is similar to the homestead exemption provision, FLA. CONST. art. VII, § 6. 326 So. at 436.

188. "The holder of any tax certificate . . . may at any time after 2 years have elapsed since April 1 of the year of issuance of the tax sale certificate . . . file the certificate and an application for a tax deed with the tax collector . . . ." FLA. STAT. § 197.241(1) (Supp. 1976). Furthermore, the holder "shall pay the [tax] collector all amounts required for redemption or purchase of all outstanding tax certificates, plus interest, any omitted taxes, plus interest, and delinquent taxes, plus interest, covering the land." FLA. STAT. § 197.241(2) (Supp. 1976).

189. These costs include the fees paid by the holder to the circuit court, the costs of the

the statutory bid for the purchase of the property by the certificate holder.[190] The property is put up for auction with the clerk of the court responsible for notice to the owners prior to the sale as well as advertisement and administration of the sale.[191]

Mid-State Homes, Inc. v. Reed[192] involved the issue of the sufficiency and due process of notice in tax deed cases. Mid-State Homes sued to set aside a tax deed, contending it was the legal titleholder of record for the property in question since the court clerk had failed to give it notice prior to the sale of its property at a tax deed sale. The plaintiff had acquired title to the property in August of 1972 via a certificate of title, which did not bear its address.[193] Slightly more than one year later the clerk of the circuit court published and mailed a notice of application for a tax deed to the owner of the property as listed on the tax roll when the property was last assessed.[194]

The District Court of Appeal, First District, cited to its previous decision in *Bailey v. Folks*[195] and held that the clerk of the court had fulfilled his duty under the applicable statute[196] when he mailed the notice to the person who had been assessed last as the

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sale, redemption of other tax certificates on the same land, plus interest at the rate of eight percent per annum for one month.

190. FLA. STAT. § 197.520 (1971)(current version at FLA. STAT. § 197.266 (1975)).

191. FLA. STAT. § 197.241(2) (Supp. 1976).

If the property is purchased by one other than the certificate holder, the holder shall be paid back the sums he has paid, including the amount required for redeeming the tax certificate, all subsequent unpaid taxes, plus costs and expenses of the application for deed with interest for one month at the rate of eight percent per year. FLA. STAT. § 197.535(1) (1971)(current version at FLA. STAT. § 197.291 (1975)).

Any amounts received in excess of the statutory bid of the certificate holder as provided in Florida Statutes section 197.520 (1973) shall be paid as specified by this statute in a priority order of other tax liens and special assessments liens with any balance thereafter being paid to the owner. FLA. STAT. § 197.535(2) (1973).

192. 332 So. 2d 43 (Fla. 1st Dist. 1976).

193. This certiticate of title was prepared by the plaintiff's attorney.

194. This procedure is in accordance with the Florida statute on mailing notice to the owner where the application is made by the holder of a tax certificate. FLA. STAT. § 197.256(1) (1975). The statute provides that:

> [T]he clerk of the circuit court shall notify, be certified mail with return receipt requested, the legal titleholder. . . .
>
> [I]f the address of the owner appears on the record of the conveyance of the lands to the owner, or, if the address of the owner does not appear thereon, then the notice shall be mailed . . . to the owner to whom the property was assessed on the tax roll for the year in which the property was last assessed . . . .

195. 182 So. 2d 477 (Fla. 1st Dist. 1966).

196. FLA. STAT. § 197.256(1) (1975).

owner of the property. The court stated that the only issue presented by *Mid-State Homes* was whether the clerk of the circuit court failed to give it notice as the legal titleholder of record, prior to selling the property at a tax deed sale. Apparently, the appellant did not raise any issue concerning the due process constitutionality of the statute itself by alleging insufficiency of notice.

In *Bailey,* the First District denied a plaintiff's contention that the owner of property was entitled to notice if his name appeared either on "the last extended tax roll, or . . . in the most recent tax collector's receipt book."[197] The court held that since the tax roll showed entries under "name of owner and address" for the properties, it was unnecessary for the court to look to the receipt book[198] even though the entries for the owner did not refer to the plaintiff, who was the actual owner of the property. In *Mid-State Homes* there was no address on the tax roll for the plaintiff, yet the clerk took the extra step of sending notice to the one to whom the property last was assessed.[199] Clearly, the clerk's actions in *Mid-State Homes* met the standard of diligence imposed by *Bailey,* and the First District held accordingly.

Another case involving the due process notice issue, *Stubbs v. Cummings,*[200] also was decided in favor of the state. There, the District Court of Appeal, First District, considered an executrix's appeal concerning the procedures by which a tax deed had been issued on her aunt's property. The aunt had inherited the property in 1958 and paid the taxes on it until 1968. During this time the original owner's name was retained on the tax statements and tax rolls. In 1968, the aunt was declared legally incompetent, but no guardian was appointed for her person or property. After the aunt's death in May 1972, but before an executrix was appointed for her estate, a tax deed was issued on her property.

The executrix filed suit against the holders of the tax deed to have the deed set aside, contending that the procedures followed in the issuance of the tax deed were insufficient to divest lawful ownership of the property from an incompetent, and that the procedures followed constituted a taking of property without due process of law

197. 182 So. 2d at 478.

198. *Id.* at 479.

199. The clerk of the circuit court also published a notice of application for a tax deed, presumably as provided under Florida Statutes section 197.246 (1975).

200. 336 So. 2d 412 (Fla. 1st Dist. 1976).

in violation of both the federal and state constitutions. The executrix's contention was not founded on a failure by the county to follow the procedures prescribed by the Florida statutes.[201] Rather, the plaintiff argued that there was an absence of the due process standards set out by the United States Supreme Court's decision in *Covey v. Town of Somers.*[202] *Covey* involved the foreclosure of real property due to nonpayment of taxes. The Supreme Court held that "[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to . . . afford . . . [interested parties] an opportunity to present their objections."[203] *Covey* added that "[t]he means employed [to achieve notice] must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it."[204]

As in *Stubbs v. Cummings,* the owner of the property subject to the tax deed in *Covey* was mentally incompetent. The First District distinguished the *Covey* case by noting that the key fact in *Covey* was that the town officials were aware that the owner was mentally incompetent,[205] while in *Stubbs* the officials in question had no actual knowledge of the aunt's incompetency "or even of her ownership of the property."[206]

The executrix in *Stubbs,* alleged also that there was constructive notice of the aunt's incompetency because it became a matter of public record when she was declared incompetent by a judicial officer in the county in which the property was located. The First District presaged its answer to the allegations of the executrix when it phrased the constructive service issue as whether any county official charged with giving notice "of procedures which lead to [the] loss of land for nonpayment of taxes has the duty to search all public records available to him to ascertain the actual status of ownership

201. FLA. STAT. § 197.505 (1971) (current version at FLA. STAT. § 197.256 (1975)). This section contains the relevant notice provisions for application for tax deeds.

202. 351 U.S. 141 (1956).

203. *Id.* at 146 (quoting Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950)).

204. *Id.* at 146 (quoting Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 315 (1950)).

205. In *Covey* a committee was not appointed to act as guardian until after a default had been entered in the foreclosure proceedings. The committee's motion to open the default was denied.

206. 336 So. 2d at 415.

of the property and the incompetency of . . . [a] party."[207] The court found that the statute has no such requirement.[208] The First District stated that it is the function of the legislature to prescribe a system which imposes and collects taxes, and that the ultimate resort for the collection of these taxes is to the land itself. The court held that the legislature has not seen fit to adopt a procedure requiring county officials "to ascertain the status of owners of property by a search of all public records which might reveal same, but rather [has chosen to] rely upon the tax rolls or tax collector receipt books or other information that is directly furnished them by interested parties."[209] Quoting a previous case[210] involving the effect of disabilities, the court held that the "courts have no authority to alleviate harshness of taxing acts where such relief is not provided for in the statutes of the states."[211]

Finally, the *Stubbs* court found that there was no failure of due process: "[A]ctual receipt of notice is not required, but strict adherence to statutory requirements is essential. The notices required are those deemed by the legislature to be most apt to accomplish the purpose of actual service and meaningful appraisal of pending procedures."[212] The court stated that such statutes are analogous to the concept of constructive notice by publication which may be utilized in matters pertaining to real property. Although the court dealt thoroughly with the notice required by the state statute, it did not analyze precisely the constitutional due process issue. The court indicated that only strict adherence to statutory requirements is essential. The court should have considered, however, whether the statute itself provided sufficient due process notice. A thorough examination of this statute by the court in light of the constitutional due process standards required by *Covey* might have altered the decision.

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207. *Id.*

208. *Id.* FLA. STAT. § 197.505(1) (1971) (current version at FLA. STAT. § 197.256 (1975)). The statute requires only the mailing of notice to the owner when an application had been made for a tax deed. The copy of the notice is mailed to the owner if his name and address appear on the tax roll for the year in which taxes were last extended on the property. If the name and address do not appear thereon, notice shall be mailed to the person last paying taxes according to the tax collector's receipt book. "The failure of the owner . . . to receive the notice shall not affect the validity of the tax deed issued pursuant to the notice." *Id.*

209. 336 So. 2d at 415.

210. Fleming v. Hillsborough County, 107 So. 2d 162 (Fla. 2d Dist. 1958).

211. 336 So. 2d at 416 (quoting Fleming v. Hillsborough County, 107 So. 2d 162, 166 (Fla. 2d Dist. 1958)).

212. 336 So. 2d at 416.

2. ATTACHMENT

In *Williams v. Jones*,[213] the Supreme Court of Florida upheld the validity of Florida Statutes section 196.199(7) (1975), which provides for the attachment of a lessee's own property to satisfy real property taxes on his leasehold. The court pointed out that the section allows attachment of the lessee's property to satisfy a lessee's tax indebtedness, because the lessee has no fee simple title to the land which can be attached directly.[214] The supreme court stated that designation of the manner in which taxes are to be collected is a matter within the legislature's discretion, and that the method selected by the legislature will not be disturbed absent a constitutional defect. The *Williams* court found that the collection procedures in effect in the case were consistent with the nature of the property taxed, stating that it is within the state's power to have different classes or kinds of property responsible for taxes assessed and levied against other classes and kinds of property.[215] The court added that any property a taxpayer owns may be subject to the collection of taxes if the taxpayer has been levied against. The court found that this principle was consistent with statutory collection procedures for intangible personal property taxes.[216]

II. CORPORATE INCOME TAXES

A tax measured by net income is imposed by the Florida Income Tax Code on all corporations for the privilege of conducting business, earning or receiving income, or being a resident or citizen of the state.[217] Net income is defined as adjusted federal income, as apportioned under Florida Statutes section 220.15, less any exemptions under section 220.14.[218] The Code also provides that certain income derived from sources outside the United States may be subtracted from this amount under certain conditions.[219] The District

213. 326 So. 2d 425 (Fla. 1975).

214. Normally a lessor's title would be attached regardless of the liability of the lessee to the lessor for payment of taxes. However, in this instance the plaintiffs were lessees of publicly owned property on Santa Rosa Island in Escambia County.

215. 326 So. 2d at 436.

216. FLA. STAT. § 199.262 (1975).

217. FLA. STAT. § 220.11(1) (1975).

218. FLA. STAT. § 220.12 (1975).

219. FLA. STAT. § 220.13(1)(b) 2.b., c. (1975). Section 220.13(1)(b) provides in pertinent part:

Court of Appeal, Third District, had an opportunity to interpret this last section in *Heftler Construction Co. & Subsidiary v. Department of Revenue.*[220] A New Jersey corporation which was doing business in Florida had two subsidiaries doing business in Puerto Rico. The losses incurred by these subsidiaries were included by Heftler Construction Company, not only in its tax return to the Internal Revenue Service, but also in its return to the Florida Department of Revenue. The corporation also included the property, payroll and sales of the Puerto Rican firms in its apportionment formula.[221]

The Department of Revenue, in an order approved by the governor and cabinet sitting as the head of the Department of Revenue, refused to allow the inclusion of any figures derived from operations in Puerto Rico. The Department concluded that the term "United States" in section 220.13(1)(b)2b[222] should be defined so as not to include Puerto Rico. The Department relied on an administrative ruling which provided that "income derived from sources within a possession or territory of the United States shall be treated as income derived from sources outside the United States."[223]

The term "everywhere" as used in section 214.71(3)[224] is defined by section 220.15(3)[225] to mean "in all states of the United States,

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2. There shall be subtracted from such taxable income any amount included therein:

b. Which was derived from sales outside the United States, and from sources outside the United States as interest, as a royalty, or as compensation for technical or other services; and

c. Which was received as a dividend from a corporation which neither transacts any substantial portion of its business in the United States nor regularly maintains any substantial portion of its assets within the United States.

However, as to any amount subtracted under this subparagraph, there shall be added to such taxable income all expenses deducted on the taxpayer's return for the taxable year which are attributable, directly or indirectly, to such subtracted amount.

220. 334 So. 2d 129 (Fla. 3d Dist. 1976).

221. Florida Statutes section 220.15 (1975) provides that adjusted federal income shall be apportioned to the state in accordance with part IV of chapter 214. The apportionment formulas are set out in Florida Statutes section 214.71 (1975). Under subsection (3) of that section, "[t]he sales factor is a fraction the numerator of which is the total sales of the taxpayer in this state during the taxable year or period and the denominator of which is the total sales of the taxpayer *everywhere* during the taxable year or period." FLA. STAT. § 214.71(3) (1975) (emphasis added).

222. FLA. STAT. § 220.13(1)(b)2b (1975).

223. FLA. ADMIN. CODE Rule 12C-1.13(1)(b)2 (1974).

224. FLA. STAT. § 214.71(3) (1975).

225. FLA. STAT. § 220.15(3) (1975).

the District of Columbia, or any political subdivision of the foregoing."[226] The Department compared this wording with that of the original wording,[227] which defined "everywhere" to mean "in all other states of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, or any political subdivision of the foregoing."[228] The Department concluded that the subsequent deletion of the reference to Puerto Rico evidenced a legislative intent to not include income derived therefrom. In concurring, the Third District disallowed the inclusion of income or losses derived from Puerto Rico.

III. ESTATE TAXES

Florida Statutes section 198.02 (1975) provides for the payment of a tax upon the estates of all resident decedents.[229] The Supreme court of Florida recently construed this statute in *Department of Revenue v. Golder.*[230] In *Golder*, the decedent owned property in Pennsylvania and New Jersey at the time of his death, although the bulk of his estate was in Florida. The total inheritance taxes paid in Pennsylvania and New Jersey, when added to the estate tax paid in Florida, exceeded the total federal credit allowable by section 206.43. The decedent's executrix requested a refund of that amount from the Department of Revenue pursuant to section 198.29.[231] The request was denied.

The question before the court was whether section 198.02 as

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226. *Id.*

227. 1971 Fla. Laws ch. 71-984 (codified at FLA. STAT. § 220.14(3) (1975)).

228. *Id.*

229. This section provides:

> A tax is imposed upon the transfer of the estate of every person who, at the time of death, was a resident of this state, the amount of which shall be a sum equal to the amount by which the credit allowable under the applicable Federal Revenue Act for estate, inheritance, legacy and succession taxes actually paid to the several states shall exceed the lesser of:
>
> (1) The aggregate amount of all constitutionally valid estate, inheritance, legacy and succession taxes acually paid to the several states of the United States (other than this state) in respect of any property owned by such decedent or subject to such taxes as a part of or in connection with his estate, or:
>
> (2) An amount equal to such proportion of such allowable credit as the value of properties taxable by other states bears to the value of the entire gross estate wherever situate. All values shall be as finally determined for federal estate tax purposes.

230. 326 So. 2d 409 (Fla. 1976).

231. FLA. STAT. § 198.29 (1975).

applied violated the Florida Constitution.[232] When the circuit court held that it did, the Department of Revenue appealed directly to the supreme court.[233] The supreme court had dealt with the same issue in *Green v. State ex rel. Phipps.*[234] In *Green* the court ruled that neither the constitution nor the statute authorized the collection of estate taxes in excess of the federal credit allowed.[235]

The *Golder* court decided that *Green* was precedent. Since section 198.02[236] as applied to the *Golder* facts increased the tax burden on the decedent's estate beyond the constitutional limitations, the statute was held to have produced an unconstitutional result. The court did not find it necessary to rule on the constitutionality of the statute itself.[237]

IV. SALES AND USE TAXES

A. *Extent of Power*

Florida Statutes chapter 212 (1975) prescribes sales and use taxes. Section 212.065(5),[238] as does the United States Constitution,[239] excepts all imports and exports from the application of these taxes. That section was construed recently by the Supreme Court of Florida in *Fred McGilvray, Inc. v. Askew.*[240]

In *McGilvray* a subcontractor supplied, fabricated, and installed materials for his prime contractor in connection with a construction project in the Bahamas. The contract was a cost plus fee contract. The subcontractor purchased materials from vendors both within and without the state. The goods were delivered to

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232. FLA. CONST. art. VII, § 5(a). Section 5(a) provides that:

> [n]o tax upon estates or inheritances or upon the income of natural persons who are residents or citizens of the state shall be levied by the state, or under its authority, in excess of the aggregate of amounts which may be allowed to be credited upon or deducted from any similar tax levied by the United States or any state.

233. FLA. CONST. art. V, § 3(b)(1).

234. 166 So. 2d 585 (Fla. 1964).

235. Although Florida has changed its constitution since *Green* was decided, the substance of the prior prohibition of estate taxes in excess of the federal credit has carried forward unchanged. FLA. CONST. art. VII, § 5.

236. FLA. STAT. § 198.02 (1975).

237. 326 So. 2d at 411.

238. FLA. STAT. § 212.06(5) (1975).

239. U.S. CONST. art. I, § 10, cl. 2. The Constitution exempts imports and exports from taxation except "what may be absolutely necessary for executing its inspections laws."

240. 340 So. 2d 475 (Fla. 1976).

Transworld Marine in Miami and later loaded onto barges chartered by the prime contractor. No bills of lading or export declarations accompanied the goods. The barges transporting the goods were not common carriers. Florida levied a sales and use tax on the goods, and the subcontractor contested that action.

The court perceived the issue to be whether the goods were exports within the meaning of the "import-export clause"[241] of the United States Constitution and thus immune from taxation. The court looked to the tests provided under Florida law[242] to help determine whether the goods were exports. Goods are deemed to be exports when they have entered the export stream. Entrance occurs when they are delivered to the first common carrier with an ultimate destination outside the state, or to a licensed exporter for exporting.[243]

The subcontractor never contended that the statutory conditions were met; it argued that the financial and contractual arrangements which it had with the prime contractor showed a commitment to export the goods. The subcontractor relied on *State ex rel. Sunair Electronics, Inc. v. Green,*[244] in which the District Court of Appeal, First District, held that placing equipment aboard the purchaser's aircraft committed the property to the export stream and passed title to the purchaser as effectively as placing the equipment on a common carrier.[245] The *McGilvray* court distinguished *Sunair Electronics* because the goods were placed directly on the aircraft and were not, as in *McGilvray,* stored in a warehouse prior to shipment.[246]

The court then turned for support to three decisions of the United States Supreme Court.[247] Each decision addressed the issue

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241. U.S. CONST. art I, § 10, cl. 2.

242. FLA. STAT. § 212.06(5) (1975). This section provides in relevant part:

(a) It is not the intention of this chapter to levy a tax upon tangible personal property imported, produced or manufactured in this state for export, provided that tangible personal property shall not be considered as being imported, produced or manufactured for export unless the importer, producer or manufacturer delivers the same to a licensed exporter for exporting, or to a common carrier for shipment outside the state or mails the same by United States mail to a destination outside the state . . . .

243. *Id.*

244. 177 So. 2d 490 (Fla. 1st Dist.), *cert. discharged,* 180 So. 2d 464 (Fla. 1965).

245. *Id.* at 495.

246. 340 So. 2d at 477.

247. Kosydar v. National Cash Register Co., 417 U.S. 62 (1974); Empresa Siderurgica, S.A. v. Merced County, 337 U.S. 154 (1949); Coe v. Errol, 116 U.S. 517 (1886). Though the

of when goods are considered to have entered the export stream. In the most recent case, *Kosydar v. National Cash Register Co.*,[248] an Ohio ad valorem personal property tax was upheld by the Court. The *Kosydar* decision was reached because the machines upon which the tax was imposed had been stored in a warehouse for three years and there was no certainty that they would be exported. As the Court noted in *Empresa Siderurgica S.A. v. Merced County:*[249]

> [I]t is not enough that there is an intent to export, or a plan which contemplates exportation, or an integrated series of events which will end with it . . . . It is the entrance of the articles into the export stream that marks the start of the process of exportation. Then there is certainty that the goods are headed for their foreign destination and will not be diverted to domestic use. Nothing less will suffice.[250]

Deciding that the goods had not yet entered the export stream, the *McGilvray* court upheld the imposition of the tax.

Both parties and the court appear to have overlooked one key fact. Some of the goods were purchased outside the state. At least with respect to those goods, the issue should not have been whether they had entered the export stream; it should have been whether they had ever left the stream of commerce, i.e., the interstate *and* foreign stream of commerce.

This aspect of *McGilvray* should be controlled by *Minnesota v. Blasius.*[251] There, cattle were shipped from outside the state to stockyards in St. Paul, Minnesota. Blasius purchased the cattle in St. Paul for resale out of state. He later sold the cattle to nonresidents, and the cattle were shipped out of state. Since Blasius owned the cattle and held them in the state on the tax day, he was assessed taxes for them. The United States Supreme Court upheld the imposition of the taxes because "the original shipment was not suspended; it was ended. That shipment was to the South St. Paul stockyards for sale on that market. That transportation had ceased, and the cattle were sold . . . to Blasius, who became absolute owner

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tax under consideration in each case is an ad valorem property tax, unlike the sales and use tax being tested here, the principles involved are the same. Fred McGilvray, Inc. v. Askew, 340 So. 2d at 478.

248. 417 U.S. 62 (1974).

249. 337 U.S. 154 (1949).

250. *Id.* at 156-57.

251. 290 U.S. 1 (1933).

and was free to deal with them as he liked."[252] The Court would have invalidated the tax if the original shipment had been merely temporarily interrupted.[253]

The subcontractor in *McGilvray* did not purchase the goods in Miami and look around for a buyer. The goods were purchased outside the state with a buyer in mind. They were shipped to Miami in order to be loaded on the barges chartered by the contractor. In *Blasius* "[t]he cattle were not held . . . for the purpose of promoting their safe or convenient transit. They were not in transit. Their situs was in Minnesota where they had come to rest."[254] Therefore, the tax was upheld. On the other hand, the goods in *McGilvray* were delayed because they were being switched from one carrier to another. Under *Blasius,* therefore, the shipment merely was suspended, it had not ended.

The point at which the protection of the constitution begins is when the goods "commence their final movement for transportation from the State of their origin to that of their destination."[255] Since the subcontrator was purchasing the goods for the prime contractor in connection with the construction project in the Bahamas, it is clear that the goods were intended for the Bahamas as soon as they left the out-of-state vendors. That the prime contractor purchased the goods from the subcontractor in Miami is misleading. Since it was a cost plus fee type of contract, the parties had already agreed that the subcontractor would first buy the goods in its own name, and get "reimbursed" for its cost plus earn a fee. But even if it were a separate sale, the Supreme Court has suggested[256] that whenever the interruption in transit is related to the necessities of the journey, as it arguably was in *McGilvray,* the constitutional protections still prevent the imposition of the tax.[257]

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252. *Id.* at 12.

253. *Id.* at 9-10.

254. *Id.* at 12.

255. Coe v. Errol, 116 U.S. 517, 525 (1886).

256. Minnesota v. Blasius, 290 U.S. 1 (1933); Carson Petroleum Co. v. Vial, 279 U.S. 95 (1929); Coe v. Errol, 116 U.S. 517 (1886).

257. Note that *Blasius* and *Coe* are decisions made under the interstate commerce clause, U.S. CONST. art. I, § 8, cl. 3, not under the import-export clause, U.S. CONST. art. I, § 10, cl. 2. It has been suggested that though the tax may not be repugnant to the import-export clause, its imposition should be restrained as a burden on interstate and foreign commerce, to the extent that it is imposed with respect to goods the subcontractor purchased from outside the state.

In *Coe* the Court distinguished the situation before it from the case where goods which are already in transit are delayed en route to another state. "Such goods are already in the

Though the subcontractor and the prime contractor may have been aware that the ultimate destination of the goods was the Bahamas, absent any bills of lading and export declarations to that effect, it is understandable that the Department of Revenue was inclined to think otherwise. Nevertheless, since those documents are only referred to as evidence of an intent to export goods, the subcontractor should have been given an opportunity to provide evidence of like weight, though of a different nature.[258] If the nature of the contract, or of the construction project, or of the relationship of the parties would indicate that the goods were destined for the Bahamas, such evidence should be used to prevent the imposition of this tax.

The supreme court responded to this argument with an excerpt from *Sumitomo Forestry Co. v. Thurston County*:[259] "[c]ertainty of export evidenced by financial and contractual relationships does not by itself render goods 'exports' before their [sic] commencement of their journey abroad."[260] *Sumitomo* is distinguishable from *McGilvray* because it does not involve goods which were already in transit prior to "resting." A more analagous case is *Carson Petroleum Co. v. Vial.*[261] There, oil was shipped by railroad from out of state to Louisiana, where it was stored in tanks prior to being loaded on ships bound for foreign ports. The United States Supreme Court held that the storage of the oil in the tanks did not break the stream of commerce.[262] Thus, the tax was invalidated.

The language of *Carson* indicates the Court would not have been concerned with the lack of bills of lading and export declarations here. Whether goods are exports must depend on "all the evidential circumstances,"[263] not the presence or absence of particulars. The Supreme Court of Florida should have looked beyond the absence of bills of lading and export declarations. The court should

course of commercial transportation, and are clearly under the protection of the Constitution." 116 U.S. at 525.

258. *See* Carson Petroleum Co. v. Vial, 279 U.S. 95 (1929); Hughes Bros. Co. v. Minnesota, 272 U.S. 469, 473 (1926); Western Oil Ref. Co. v. Lipscomb, 244 U.S. 346, 349 (1917).

259. 504 F.2d 604 (9th Cir. 1974), *cert. denied*, 423 U.S. 831 (1975).

260. 340 So. 2d at 578 (quoting Sumitomo Forestry Co. v. Thurston County, 504 F.2d 604, 608 (9th Cir. 1974) (quoting Empresa Siderurgica, S.A. v. Merced County, 377 U.S. 154, 156-57 (1949)).

261. 279 U.S. 95 (1929).

262. *Id.* at 109.

263. *Id.* at 103 (quoting Hughes Bros. Co. v. Minnesota, 272 U.S. 469, 476 (1926)).

have looked at the financial and contractual relationship of the parties.

As in *Carson*, the tax levied in *McGilvray*, at least with respect to those goods shipped from out of state, should have been invalidated. *Minnesota v. Blasius*[264] and *Carson* involve facts and principles too analagous to those in *McGilvray* to warrant the decision that was made.

B. *Exemptions*

1. THE STATE

The City of Tallahassee imposed a utility tax through an ordinance establishing a ten percent tax on all purchases of electricity, water, and gas within the city limits.[265] The city sought to act pursuant to article VII, section 9(a) of the Florida Constitution[266] and the municipal finance and taxation section of the Municipal Home Rule Powers Act.[267] The ordinance adopted by the city specifically exempted from the utility tax purchases made by either the federal government or churches. The ordinance, however, did not provide a like exemption for the state.

Under the Municipal Home Rule Powers Act, a municipality "may exempt" from taxation purchases made by the United States government and the state government.[268] Additionally, it "shall exempt purchases by any recognized church."[269] The State of Florida challenged the constitutionality of this enabling statute, contending that neither the constitutional nor statutory foundation for the tax expressly waived the state's inherent sovereign immunity from taxation. The city responded that the 1968 Constitution, in conferring municipal taxing authority, did not reserve the right of sovereign immunity.

The Supreme Court of Florida held that the state's "freedom from taxation derives from an 'immunity,' not from an

264. 290 U.S. 1 (1933).

265. Dickinson v. City of Tallahassee, 325 So. 2d 1 (Fla. 1975).

266. FLA. CONST. art. VII, § 9(a). This section provides in relevant part that municipalities "may be authorized by general law to levy other [than ad valorem] taxes . . . except . . . taxes prohibited by this constitution."

267. FLA. STAT. § 166.231 (1973). This statute gives municipalities the power to levy a tax on purchases of electricity, gas, water service, telephone service, telegraph service, and cable television.

268. FLA. STAT. § 166.231(4) (1973).

269. *Id.* This exemption only applies to purchases used exclusively for church purposes.

'exemption.' "[270] Furthermore, the courtheld that the state did not waive its immunity either in the 1968 Constitution or in the enabling statute. The supreme court indicated that it seemed unlikely that the state would indirectly authorize an indeterminate amount of revenue to be taken from it for the benefit of municipalities. The court added that the logical approach would be to require a clear and direct expression of the state's intention to subject itself to local taxation. Since the supreme court did not find such an expression, it held that the state's immunity from taxation was intact.

2. PRIVATE UTILITIES

Department of Revenue v. Merritt Square Corp.[271] involved a shopping center owner, which contended that it was a private utility, therefore exempt from having to pay sales tax on its purchases of natural gas. Florida Statutes section 212.08(4) (1975) provides that all fuels used by public or private utilities shall be exempt from sales taxation.[272] The taxpayer operated an energy plant on its property which generated electricity. Sixty percent of its generated power was metered separately and sold to tenants in the shopping center for use in their respective businesses. The residual electricity was used by the shopping center to provide for the common areas of the complex.

The District Court of Appeal, First District, held that the taxpayer was entitled to an exemption from the sales tax on that portion of the electricity sold to the tenants. The court added, however, that the gas purchased for use in the common areas was "not used in 'generation of electric power or energy for sale.' "[273] Additionally, the First District noted that where the electricity is paid for by the tenant in the form of rent,[274] it is impossible to segregate the portion of the rent attributable to this purchase.

The First District's reason for affirming the sixty percent exemption rested on its determination that the taxpayer was a private

270. Dickinson v. City of Tallahassee, 325 So. 2d 1, 3 (Fla. 1975).

271. 334 So. 2d 351 (Fla. 1st Dist. 1976).

272. Also included within the statute are "municipal corporations and rural electric cooperative associations in the generation of electrical power or energy for sale." FLA. STAT. § 212.08(4) (1975).

273. 334 So. 2d at 353 (quoting FLA. STAT. § 212.08(4) (1975)).

274. The tenants each were charged a maintenance fee on a square foot basis for general maintenance and utility services to the common areas of the shopping center.

utility. Under the exemption statute[275] both public and private utilities are exempt from sales taxation. Since the legislature defined "public utility" to include any entity supplying electricity or gas to the public, the court theorized that the phrase had a distinct meaning. The court defined private utility as an entity selling energy to a limited group. Accordingly, the First District held that Merritt Square was a private utility with respect to its sales of electricity to its tenants and was entitled to an exemption from the sales tax on its purchases of natural gas for resale.

V. DOCUMENTARY STAMP TAXES

A. *Scope*

Florida Statutes section 201.02 (1975)[276] imposes a tax through the sale of stamps which must be affixed to documents for certain kinds of transactions. The tax is paid by the purchaser and is measured as a percentage of the consideration paid. The Supreme Court of Florida recently construed this statute in *Florida Department of Revenue v. De Maria.*[277]

De Maria was the president and sole stockholder of Orange Motors of Miami. The corporation acquired real property for $85,000 including a purchase money mortage of $60,000. The property later was conveyed by the corporation to De Maria in a quitclaim deed. Although not assuming the mortgage, De Maria made the payments for the purpose of satisfying the mortgage. The Department of Revenue imposed a documentary tax under section 201.02[278] and a pen-

275. FLA. STAT. § 212.08(4) (1975).

276. Section 201.02 provides:

(1) On deeds, instruments or writings whereby any lands, tenements, or other realty, or any interest therein, shall be granted, assigned, transferred, or otherwise conveyed to, or vested in, the purchaser, or any other person by his direction, on each one hundred dollars of the consideration therefore the tax shall be thirty cents. When the full amount of the consideration for the execution, assignment, transfer, or conveyance is not shown in the face of such deed, instrument, document, or writing, the tax shall be at the rate of thirty cents for each one hundred dollars or fractional part thereof of the consideration therefor.

(2) The tax imposed by subsection (1) of this section shall also be payable upon documents by which the right is granted to a tenant-stockholder to occupy an apartment in a building owned by a cooperative apartment corporation.

(3) The tax imposed by subsection (2) shall be paid by the purchaser, and the document recorded in the office of the clerk of the circuit court as evidence of ownership.

277. 338 So. 2d 838 (Fla. 1976).

278. FLA. STAT. § 201.02 (1975).

alty under section 201.17.[279] De Maria brought an action to prevent imposition of the tax. The circuit court and later the District Court of Appeal, First District,[280] ruled that he did not have to pay the tax because the transfer was a mere "book transaction" as in *State ex rel. Palmer-Florida Corp. v. Green.*[281]

Judge Smith of the First District dissented on the grounds that the transaction was an attempt to shift the burden of paying the mortgage note from the corporation to the plaintiff and as such, amounted to a taxable consideration for the conveyance.[282] He argued that the supreme court's decision in *Kendall-House Apartments, Inc. v. Department of Revenue*[283] should be controlling and that the court should look to the financial realities of a situation when a corporation deeds property to a stockholder. Thus, he reasoned that the taxpayer's payment of the mortgage obligation evidenced the financial reality that the taxpayer had assumed the mortgage.[284]

The First District had an opportunity to reexamine its *De Maria* holding in *Straughn v. Story.*[285] In *Story* a corporation owned

279. FLA. STAT. § 201.17 (1975).

280. Department of Revenue v. De Maria, 321 So. 2d 101 (Fla. 1st Dist. 1975), *rev'd*, 338 So. 2d 838 (Fla. 1976).

281. 88 So. 2d 493 (Fla. 1956). In *Green* a corporation conveyed an interest in real property to its stockholders in amounts proportionate to their holdings in the corporation. The property was unencumbered. The value of the real estate was charged to the paid-in surplus account of the corporation. Documentary stamps were affixed to the deed, but it was later contended that the tax was erroneously paid. The court held that the deed did not require the stamps because the stockholders were not purchasers and did not pay a "reasonably determinable" consideration within the meaning of section 201.02. It was held to be a mere book transaction and not the kind of sale to a purchaser contemplated by the statute.

282. 321 So. 2d at 102.

283. 245 So. 2d 221 (Fla.), *cert. denied*, 404 U.S. 832 (1971). Kendall House Apartments sold real estate to a grantee and agreed to pay all the documentary taxes. The property was sold subject to a mortgage, but the grantor agreed to continue making the payments only until the date of closing, Kendall-House Apartments affixed stamps to the deed so that taxes were paid on the purchase price of the property but not on the outstanding mortgage. The Department of Revenue argued that the mortgage must be included as part of the consideration. The supreme court pointed out that "[i]t is an economic fact that persons who acquire property 'subject to' a mortgage normally pay the indebtedness represented by the mortgage in order to prevent the loss of the property to the same extent as those persons acquiring property 'assuming and agreeing to pay' the mortgage." *Id.* at 223. The court held that the shifting of the economic burden constituted additional consideration and an additional taxable sum. Thus, the tax was upheld.

284. 321 So. 2d at 102.

285. 334 So. 2d 337 (Fla. 1st Dist. 1976).

real estate encumbered by a recorded mortgage securing a promissory note in the original amount of $1,800,000. The plaintiffs executed a guaranty of loan agreement with the corporation as the borrower. Under the terms of the agreement, if the corporation were to default, the guarantor would become primarily liable. The agreement also provided that the corporation could not transfer the property without the lender's consent, and then only if the transferee became primarily liable on the note. The corporation then transferred the property to the guarantor without the payment of any consideration. The Department of Revenue tried to impose a documentary stamp tax under section 201.02[286] and a penalty under section 201.17(2).[287]

The trial court decided that the plaintiff-guarantor was not a purchaser within the meaning of section 201.02.[288] The First District affirmed, distinguishing Judge Smith's dissent in *De Maria* because there was no shifting of any burden of payment. The court found that the plaintiff-guarantor did not assume any obligations for which he already was not completely responsible. As in *De Maria*, the court based its decision on *State ex rel. Palmer-Florida Corp. v. Green.*[289]

Again Judge Smith dissented, arguing that the shift from being secondarily liable to being primarily liable was sufficient consideration to force the plaintiff to become liable for tax payments.[290]

Because of an apparent conflict between the First District's holding in *De Maria* and the supreme court's holding in *Kendall-House Apartments,* the supreme court decided to hear the *De Maria* case. The supreme court agreed with the dissent of Judge Smith and reversed the earlier ruling of the First District, holding that the shifting of the economic burden was sufficient consideration to make the taxpayer a purchaser within the meaning of the statute. *State ex rel. Palmer-Florida Corp. v. Green* was distinguished because it dealt with property which was unencumbered.

Though *Story* has not yet been heard by the supreme court, and may not be, it would appear that the *De Maria* ruling ends speculation about the validity of that result. In the future, courts should

286. FLA. STAT. § 201.02 (1975).
287. FLA. STAT. § 201.17(2) (Supp. 1976).
288. FLA. STAT. § 201.02 (1975).
289. 88 So. 2d 493 (Fla. 1956).
290. 334 So. 2d at 339.

follow the *Kendall-House Apartments* approach of looking to the financial reality of the conveyance and not to the form of the transaction.

B. *Surtax*

Florida Statutes section 201.021 (1975)[291] levies a surtax on documents taxed under section 201.02.[292] The section, however, excludes specifically the amounts of existing mortgages from the application of the surtax. The section, especially the latter provision, was construed recently by the District Court of Appeal, First District, in *Department of Revenue v. Brookwood Associates, Ltd.*[293]

In *Brookwood Associates,* the purchaser acquired land which was encumbered by an existing mortgage. The purchaser entered an agreement with the seller whereby the purchaser would make payments on the first morgage to the seller at the same time that payments were made on a second mortgage. The seller, mortgagee to the purchaser, and mortgagor to the original lender, then would make payments directly to the original mortgagee.[294]

While paying the documentary tax on the entire amount of the consideration paid, the purchaser excluded the amount of the first mortgage from the sum on which the surtax was paid. The Department of Revenue assessed the purchaser for that additional amount plus a penalty under section 201.17(2).[295] The court refused to up-

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291. This section provides:

(1) A documentary surtax, in addition to the tax levied in s. 201.02, is levied on those documents taxed by s. 201.02 at the rate of fifty-five cents per five hundred dollars of the consideration paid; provided, that when real estate is sold, the consideration, for purposes of this tax, shall not include amounts of existing morgages on the real estate sold. If the full amount of the consideration is not shown on the face of the document, then the tax shall be at the rate of fifty-five cents on each five hundred dollars or fractional part thereof of the consideration.

(2) The Department of Revenue shall pay all taxes collected under this section to the Treasurer for deposit in the Land Acquisition Trust Fund. Sums deposited there may be used for any purpose for which funds deposited in the Land Acquisition Trust Fund may lawfully be used and may be used to pay the cost of the collection and enforcement of the tax levied by this section.

292. FLA. STAT. § 201.02 (1975).

293. 324 So. 2d 184 (Fla. 1st Dist. 1975).

294. For a discussion of this kind of arrangement, see Comment, *The Wrap-Around Mortgage: A Critical Inquiry*, 21 U.C.L.A.L. REV. 1529 (1974).

295. FLA. STAT. § 201.17(2) (1975). This section was amended in 1976 to provide an additional penalty for failure to pay the required tax: "(C) Payment of interest to the Department of Revenue, accruing from the date of recordation until paid at the rate of one percent per month or fraction thereof, based on the purchase price of the stamps not affixed."

hold the imposition of the additional tax, commenting that to do so "would utterly frustrate the glaring legislative intent."[296]

Section 201.021 subsequently was construed by the District Court of Appeal, Fourth District, in *Leadership Housing, Inc. v. Department of Revenue.*[297] The taxpayers there, whose business was selling improved residential property, had sold nineteen homes to nineteen different purchasers. Prior to sale, each home was encumbered by a mortgage between the taxpayer and a lender. Each sale provided that the purchaser would assume the existing mortgage after making a partial payment to the taxpayer.

Documentary stamp taxes were paid on both the cash amounts and the amount of the mortgages, but the surtax was paid only on the cash amounts. The Department of Revenue argued that the surtax also would have to be paid on the mortgage value. It contended that the original obligation was extinguished and a new obligation substituted when the mortgages were assumed.[298] The court pointed out that if the original mortgage obligation could be so easily extinguished, "the lender would be in danger of losing its priority to any intervening lien filed prior to creation of the 'new mortgage.'"[299]

C. *Penalties for Nonpayment*

Under Florida Statutes section 201.17(2) (1975) a penalty is levied for failure to pay the documentary stamp tax. Violators must purchase the stamps necessary and pay a penalty equal to the value of the stamps not affixed. The Supreme Court of Florida upheld that section as constitutional in *Dominion Land & Title Corp. v. Department of Revenue.*[300]

Dominion was the title insuring agent for Commonwealth Land & Title Insurance Co. It handled the recordation of a certain warranty deed conveying real property in Dade County. Documentary

296. 324 So. 2d at 186.

297. 336 So. 2d 1239 (Fla. 4th Dist. 1976).

298. The state relied on an administrative ruling of the Department of Revenue, FLA. ADMIN. CODE § 12A-4.13(25) (1973), which provided that "[w]hen computing the surtax under Section 201.021, F.S., on a deed of conveyance, the total consideration on which such tax is based includes a mortgage debt which the grantee assumes and agrees to pay when the original mortgagor (grantor) is released from the obligation by the mortgagee." The state also relied on an opinion of the Attorney General. [1973] FLA. ATT'Y GEN. ANN. REP. 67.

299. 336 So. 2d at 1242.

300. 320 So. 2d 815 (Fla. 1975).

stamps[301] and surtax stamps[302] were due in the respective amounts of $17,700 and $3,500. Though Dominion received payment covering the cost of the stamps, it accidentally left off the list the amounts required for the purchase of the stamps while it was preparing a list of the fees and tax charges. Nevertheless, the clerk of the circuit court accepted the deed without the stamps. Shortly thereafter, Dominion was notified that the necessary stamps were not affixed to the deed. The deed was thereupon re-recorded. The Department of Revenue then assessed a penalty under section 201.17(2) in the amount of $21,230. In response Dominion brought suit in the Circuit Court for Dade County challenging the constitutionality of section 201.17(2) and alleging that the Department of Revenue should be estopped from applying that section to it because of the clerk's error.[303] After an adverse ruling, Dominion appealed directly to the Supreme Court of Florida.[304]

The plaintiff challenged the constitutionality of the statute on the grounds that it was so harsh and unreasonable that it constituted a denial of due process within the meaning of the Florida[305] and United States Constitutions.[306] It also contended that the penalty was excessive.[307] Dominion submitted two tests for statutes imposing penalties. These tests were that the statute should be declared unconstitutional if it imposed either a fine that was so great as to shock the conscience of reasonable men or a fine bearing no rational relationship to the wrong. The court ruled the statute constitutional. It considered the legislature's plenary power in the area of taxation, the statutes of other states which were held consti-

301. FLA. STAT. § 201.02 (1975).

302. FLA. STAT. § 201.021 (1975).

303. Plaintiff's argument is essentially that it would be unjust to allow the state to collect a 100% penalty when the plaintiff relied on the state's clerk, who failed to comply with the statute. In reponse, the court noted that estoppel can only be used against the state in rare cases. It referred to Jefferson National Bank v. Metropolitan Dade County, 271 So. 2d 207 (Fla. 3d Dist.), *cert. denied*, 277 So. 2d 536 (Fla. 1972), where the District Court of Appeal, Third District, noted that "[w]hile the doctrine of estoppel can be applied against the state or its subdivisions . . . , [i]t will be invoked only under very exceptional circumstances, which must include some positive act on the part of an authorized official . . . ." *Id.* at 214. Since it was not here faced with such a situation, the court affirmed the circuit court's decision.

304. FLA. CONST. art. V, § 3(b)(1).

305. FLA. CONST. art. I, § 9.

306. U.S. CONST. amend. XIV.

307. FLA. CONST. art. I, § 17; U.S. CONST. amend. VIII.

tutional despite imposing a one hundred percent penalty,[308] and the difficulties in collecting documentary stamp taxes. The court concluded that the penalty imposed was not so oppressive that the court should invade the legislative prerogative of determining what was reasonable. The court left open the question of under what circumstances the 100 percent penalty might be reduced, saying only that "[i]n each instance the circumstances will be different, and courts have no magic yardstick by which to reduce the penalty based upon intentions and attitudes of taxpayers."[309]

The District Court of Appeal, First District, answered this question left open by the supreme court in *Dominion* by its decision in *Zuckerman-Vernon Corp. v. State Department of Revenue.*[310] Zuckerman and its joint venturer, Glick, acquired property from Bayshore. They claimed Bayshore had acquired the property as a trustee for them, and that the affixation of the stamps on the documents in the original transaction excused their use in the later transfer. A hearing officer found that Bayshore had contracted to buy the property in its corporate name, not as a trustee, and that it took title in its own name, not as a trustee, and that it had used its own funds in making the purchase. Thus, there was no trust relationship and the second transaction required the use of documentary stamps. The Department of Revenue assessed a tax of $55,649.70 and a penalty equal to that amount. The court reduced the penalty to $5,000, calling it a "reasonable amount necessary for protection of the State's interest."[311] The court was concerned that the Department of Revenue had abused its discretion to a point that was unconscionable. In seeking authority to support its reduction of the penalty, the court turned to *Dominion Land & Title Corp. v. Department of Revenue.*[312]

Florida's statute does not have any provision for discretion as to the amount of the penalty. The statute states that the failure to affix stamps shall subject the persons liable to "[p]ayment of [a] penalty to the Department of Revenue equal to the purchase price

308. *See* Davis v. Becker, 309 Ky. 775, 219 S.W.2d 6 (1949); Brittain v. Robertson, 120 Miss. 684, 83 So. 4 (1919); Bennett v. Jones, 107 Miss. 880, 66 So. 277 (1914); State *ex rel.* Hardy v. State Board of Equalization, 133 Mont. 43, 319 P.2d 1061 (1958).

309. 320 So. 2d at 818-19.

310. 339 So. 2d 685 (Fla. 1st Dist. 1976).

311. *Id.* at 687.

312. 320 So. 2d 815 (Fla. 1975).

of the stamps not affixed."[313] Any discretion as to this statute has its origin in the language of the supreme court.

The court said the "Department of Revenue alone can not determine the amount of the tax or penalty without judicial review; if after such review the court finds that under the law a modified penalty is due, by strict construction the court has its equitable power to reduce it."[314] There appears to be very little to construe. The legislature has exercised what the court characterized as its "plenary power"[315] regarding taxation, and decided that the violation was to be punished by a 100 percent fine. The court upheld the constitutional power of the legislature to do just that. The court, however, then gave the judiciary the authority to strip the legislature of its power, and reduce the penalty imposed. The *Zuckerman* court exercised this power and reduced the penalty to ten percent of the value of the stamps not affixed. In such instances, in order to reduce the penalty, a court must base its action on either the lack of power by the legislature to pass such a statute or the violation of a taxpayer's right. Since neither was shown here, the power source of the equitable action of the court is questionable in view of the explicit terms of the statute.

313. FLA. STAT. § 201.17(2)(b) (1975).

314. Dominion Land & Title Corp. v. Department of Revenue, 320 So. 2d 815, 818 (Fla. 1975).

315. *Id.*